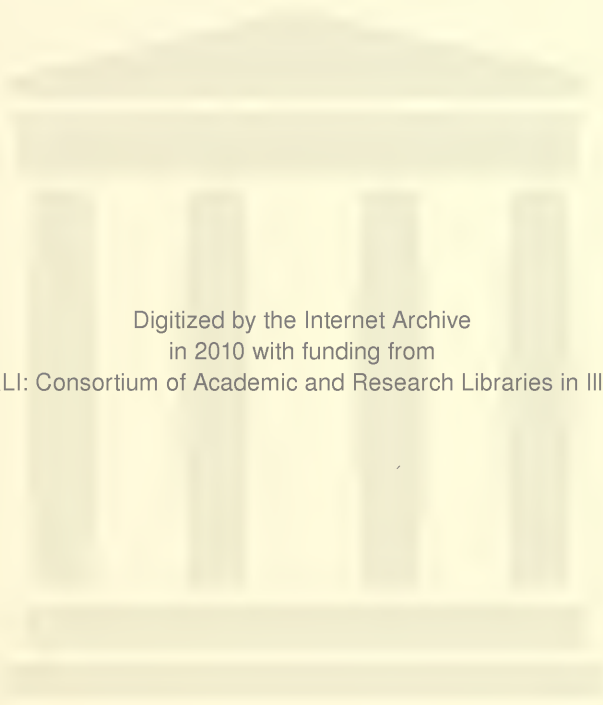


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77247

NOV 8 '60

37596

FRED J. SMITH, doing business as
J. SMITH & COMPANY,

(Plaintiff) Appellant,

v.

THE RUDOLPH WURLITZER COMPANY,

(Defendant) Appellee.

10/60
6

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

281 I.A. 601¹

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF
THE COURT.

Upon further consideration by this court upon a re-hearing we find that this cause is in this court upon an appeal by the plaintiff from a judgment entered by the court for the defendant. Action by the plaintiff was to recover \$1,000 paid to the defendant on the 18th day of January, 1932, in the purchase of 18 Mohawk refrigerators to be installed in the plaintiff's apartment building. Certain representations were made by the agent of the defendant to the plaintiff which were false and untrue. To this action defendant filed its affidavit of merits denying that representations were made which were false. The cause was submitted to a jury, which at the conclusion of the hearing returned a verdict for the plaintiff in the sum of \$1,000. The defendant then moved for a new trial. This motion was continued several times, and finally on March 5, 1934, the court considered defendant's motion for a directed verdict and entered an order stating that it, being fully advised in the premises, sustained said motion notwithstanding the verdict. Leave was also granted the defendant to withdraw its motion for a new trial, which was done. The plaintiff then moved for a new trial, and on March 5, 1934, the court denied plaintiff's motion and entered a final judgment for the

RECEIVED BY: 1104, 1124, 1144, 1164, 1184, 1204, 1224, 1244, 1264, 1284, 1304, 1324, 1344, 1364, 1384, 1404, 1424, 1444, 1464, 1484, 1504, 1524, 1544, 1564, 1584, 1604, 1624, 1644, 1664, 1684, 1704, 1724, 1744, 1764, 1784, 1804, 1824, 1844, 1864, 1884, 1904, 1924, 1944, 1964, 1984, 2004, 2024, 2044, 2064, 2084, 2104, 2124, 2144, 2164, 2184, 2204, 2224, 2244, 2264, 2284, 2304, 2324, 2344, 2364, 2384, 2404, 2424, 2444, 2464, 2484, 2504, 2524, 2544, 2564, 2584, 2604, 2624, 2644, 2664, 2684, 2704, 2724, 2744, 2764, 2784, 2804, 2824, 2844, 2864, 2884, 2904, 2924, 2944, 2964, 2984, 3004, 3024, 3044, 3064, 3084, 3104, 3124, 3144, 3164, 3184, 3204, 3224, 3244, 3264, 3284, 3304, 3324, 3344, 3364, 3384, 3404, 3424, 3444, 3464, 3484, 3504, 3524, 3544, 3564, 3584, 3604, 3624, 3644, 3664, 3684, 3704, 3724, 3744, 3764, 3784, 3804, 3824, 3844, 3864, 3884, 3904, 3924, 3944, 3964, 3984, 4004, 4024, 4044, 4064, 4084, 4104, 4124, 4144, 4164, 4184, 4204, 4224, 4244, 4264, 4284, 4304, 4324, 4344, 4364, 4384, 4404, 4424, 4444, 4464, 4484, 4504, 4524, 4544, 4564, 4584, 4604, 4624, 4644, 4664, 4684, 4704, 4724, 4744, 4764, 4784, 4804, 4824, 4844, 4864, 4884, 4904, 4924, 4944, 4964, 4984, 5004, 5024, 5044, 5064, 5084, 5104, 5124, 5144, 5164, 5184, 5204, 5224, 5244, 5264, 5284, 5304, 5324, 5344, 5364, 5384, 5404, 5424, 5444, 5464, 5484, 5504, 5524, 5544, 5564, 5584, 5604, 5624, 5644, 5664, 5684, 5704, 5724, 5744, 5764, 5784, 5804, 5824, 5844, 5864, 5884, 5904, 5924, 5944, 5964, 5984, 6004, 6024, 6044, 6064, 6084, 6104, 6124, 6144, 6164, 6184, 6204, 6224, 6244, 6264, 6284, 6304, 6324, 6344, 6364, 6384, 6404, 6424, 6444, 6464, 6484, 6504, 6524, 6544, 6564, 6584, 6604, 6624, 6644, 6664, 6684, 6704, 6724, 6744, 6764, 6784, 6804, 6824, 6844, 6864, 6884, 6904, 6924, 6944, 6964, 6984, 7004, 7024, 7044, 7064, 7084, 7104, 7124, 7144, 7164, 7184, 7204, 7224, 7244, 7264, 7284, 7304, 7324, 7344, 7364, 7384, 7404, 7424, 7444, 7464, 7484, 7504, 7524, 7544, 7564, 7584, 7604, 7624, 7644, 7664, 7684, 7704, 7724, 7744, 7764, 7784, 7804, 7824, 7844, 7864, 7884, 7904, 7924, 7944, 7964, 7984, 8004, 8024, 8044, 8064, 8084, 8104, 8124, 8144, 8164, 8184, 8204, 8224, 8244, 8264, 8284, 8304, 8324, 8344, 8364, 8384, 8404, 8424, 8444, 8464, 8484, 8504, 8524, 8544, 8564, 8584, 8604, 8624, 8644, 8664, 8684, 8704, 8724, 8744, 8764, 8784, 8804, 8824, 8844, 8864, 8884, 8904, 8924, 8944, 8964, 8984, 9004, 9024, 9044, 9064, 9084, 9104, 9124, 9144, 9164, 9184, 9204, 9224, 9244, 9264, 9284, 9304, 9324, 9344, 9364, 9384, 9404, 9424, 9444, 9464, 9484, 9504, 9524, 9544, 9564, 9584, 9604, 9624, 9644, 9664, 9684, 9704, 9724, 9744, 9764, 9784, 9804, 9824, 9844, 9864, 9884, 9904, 9924, 9944, 9964, 9984, 10004, 10024, 10044, 10064, 10084, 10104, 10124, 10144, 10164, 10184, 10204, 10224, 10244, 10264, 10284, 10304, 10324, 10344, 10364, 10384, 10404, 10424, 10444, 10464, 10484, 10504, 10524, 10544, 10564, 10584, 10604, 10624, 10644, 10664, 10684, 10704, 10724, 10744, 10764, 10784, 10804, 10824, 10844, 10864, 10884, 10904, 10924, 10944, 10964, 10984, 11004, 11024, 11044, 11064, 11084, 11104, 11124, 11144, 11164, 11184, 11204, 11224, 11244, 11264, 11284, 11304, 11324, 11344, 11364, 11384, 11404, 11424, 11444, 11464, 11484, 11504, 11524, 11544, 11564, 11584, 11604, 11624, 11644, 11664, 11684, 11704, 11724, 11744, 11764, 11784, 11804, 11824, 11844, 11864, 11884, 11904, 11924, 11944, 11964, 11984, 12004, 12024, 12044, 12064, 12084, 12104, 12124, 12144, 12164, 12184, 12204, 12224, 12244, 12264, 12284, 12304, 12324, 12344, 12364, 12384, 12404, 12424, 12444, 12464, 12484, 12504, 12524, 12544, 12564, 12584, 12604, 12624, 12644, 12664, 12684, 12704, 12724, 12744, 12764, 12784, 12804, 12824, 12844, 12864, 12884, 12904, 12924, 12944, 12964, 12984, 13004, 13024, 13044, 13064, 13084, 13104, 13124, 13144, 13164, 13184, 13204, 13224, 13244, 13264, 13284, 13304, 13324, 13344, 13364, 13384, 13404, 13424, 13444, 13464, 13484, 13504, 13524, 13544, 13564, 13584, 13604, 13624, 13644, 13664, 13684, 13704, 13724, 13744, 13764, 13784, 13804, 13824, 13844, 13864, 13884, 13904, 13924, 13944, 13964, 13984, 14004, 14024, 1404

(1901-1902)

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THE UNIVERSITY OF CHICAGO

• 1150 (1st 1000)

Opinion filed June 26, 1935

100-441110-100 (ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED)

41-9, 115

— 32 —

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which were adopted by the General Assembly of the United Nations in December 1979.

by the U.S. District Court for the

of 120,000, a review of the situation and of the

[illegible]

It is noted that the above information is being furnished to the Bureau for its information and for the Bureau's use in the event of a future investigation.

There are no other persons named in the document.

THE UNITED STATES DEPARTMENT OF THE INTERIOR

... at the conclusion of the ...

... for the ... of ...

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.

-1- Subj: [redacted] Date: [redacted]

defendant.

The question before this court is: Could the court consider this motion, made as and when it was, and enter judgment notwithstanding the verdict of the jury?

The defendant in support of its position relies on Rule 175 of the Municipal Court of Chicago, which rule is, substantially, in the language of Paragraph 196, sub-section (3) of the Civil Practice Act of 1933, wherein it is provided that in a civil action where the cause is submitted to a jury, if a party thereto at the close of the testimony and before the cause is submitted to the jury, requests the court for a directed verdict in his favor, the court may reserve its decision thereon. If after verdict is returned the court shall decide that as a matter of law the party making the request is entitled thereto, the court shall then enter ~~its~~ decision and order judgment notwithstanding the verdict of the jury.

The right to a rehearing is not provided for by statute, but is a matter of discretion of the court to give further consideration to its decision upon a rehearing, and the court will consider only the abstracts and briefs filed, together with the petition and answer to the petition for a rehearing.

This court under Rule 6 of the Appellate Court Rules will consider the abstract sufficient to fully present the error relied upon, and the abstract will be taken to be accurate and sufficient for a full understanding of the questions presented, unless the opposing party shall file a further abstract making corrections or additions. The abstract in this case upon the question involved, is as follows:

Continued.

The question before this court is: Should the court

consider this motion, and if so, what is the result?

According to the verdict of the jury,

The defendant in support of his motion

submits the following points of law, which will be considered

firstly, in the language of the defendant, (1) of the

first question set out in 1933, which is provided that in a

civil action, the court is bound by a jury, if a party

pleads in the course of the testimony and before the court is

submitted to the jury, requests the court for a directed verdict

in the event, the court may reserve its decision. It

after verdict is rendered the court shall decide that the matter

of law the party moving the court is entitled to, the

court shall then enter the decision and order judgment accordingly

according to the verdict of the jury.

The right to a directed verdict is not provided for by statute,

but is a matter of discretion left to the court to give judgment

conformable to its duty, and in the exercise of its discretion

will consider only the evidence and facts stated, together with

the position of the law as it stands at the time.

This court must take note of the evidence and facts

will consider the evidence and facts as they stand, and the court

will then, and the evidence will be taken as it stands, and

sufficient for the purpose of the law, and the court

will then, and the evidence will be taken as it stands, and

corrections or additions. The evidence is taken as it stands

and the court will then, and the evidence will be taken as it stands

"Trial of said cause coming on before a jury; the defendant moved for a directed verdict at the close of the plaintiff's evidence. Which motion was ordered entered. The jury find the issues against the defendant, The Rudolph Wurlitzer Company, a corporation, and assess the plaintiff's damages at the sum of One Thousand Dollars (\$1,000.00). The defendant moves that it be granted a new trial."

There is no other reference in the abstract except that a motion was made by the defendant for a directed verdict. The defendant in this case did not file an additional abstract as the defendant had a right to do under the rules of the court, and having failed to call the Court's attention to the record until a petition was filed for a rehearing, the court, under the rule, considered the abstract filed in the case to be accurate and sufficient for the purpose intended. The defendant in its petition for a rehearing for the first time called the attention of the court to the pertinent part of the record, which is in these words:

"Now comes the defendant by Gregory A. Gelderman its attorney at the close of all of the evidence and moves the Court to exclude the evidence and to give to the jury the following instruction, 'We, the jury, find the issues for the defendant.'"

It has been held by this court that a party cannot upon application for a rehearing rely upon grounds for a decision not brought to the attention of the court in his brief and argument filed upon the original hearing. Supreme Tribe of Ben Hur v. Miller, 123 Ill. App. 489. However, it is to be noted that the trial court did not entertain the motion in question, and the record is silent as to the disposition of the motion for a directed verdict until March 5, 1934. It would not be reasonable to construe Rule 175 of the Municipal Court of Chicago as meaning that the court shall consider a motion for an

"Trial of this case began on Monday, July 1, 1935. Defendant moved for a directed verdict at the close of the plaintiff's evidence, which motion was denied. The jury then returned a verdict for the defendant, the amount being \$10,000.00. The plaintiff moved for a new trial, which motion was denied."

There is no other reference in the record to the fact that a motion was made by the defendant for a directed verdict. The defendant in this case did not file an additional motion and the defendant had a right to do under the rules of the court, and having failed to call the court's attention to the record, a motion was filed for a rehearing, the court, under the rules, considered the evidence filed in the case to its record, and sustained the verdict. The defendant in its petition for a rehearing for the first time called the attention of the court to the defendant's motion of the record, which is as follows:

"Now comes the defendant by Henry J. [Name] and moves for a new trial on the ground that the evidence was not properly presented to the jury and that the verdict is against the weight of the evidence. The defendant moves for a new trial on the ground that the evidence was not properly presented to the jury and that the verdict is against the weight of the evidence."

It has been held in this court that a party cannot upon application for a rehearing, raise new grounds for a rehearing not brought to the attention of the court in his brief and argument filed with the original motion. People v. [Name], 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000.

instructed verdict in all cases only after the verdict of the jury has been recorded. The more reasonable construction would be that at the time the motion to instruct is presented, the court may, within its discretion, enter an order either allowing, denying, or reserving the motion to be considered after the verdict. According to the record, no order was entered at the time the motion was filed.

It is apparent that the defendant did not comply with the rule to retain the Court's jurisdiction, and the court erred in considering the motion and entering the judgment for the defendant, as shown by the record.

The cause must be retried, and for the reasons stated in the opinion it is not necessary to consider the facts at this time.

The judgment for the defendant is reversed and the cause remanded for a further trial.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

instructed variety is all cases only after the subject is
 just has been presented. The most reasonable explanation is
 be that at the time the time is instructed is presented, the
 court may, either for disapproval, either in order of the subject,
 heavy, or otherwise, the subject to be considered after the
 variety. According to the subject, at once the subject of the
 time the subject was filled.

It is apparent that the defendant did not comply with
 the rule to retain the court's jurisdiction, and the court acted
 in considering the motion and entering the judgment for the
 defendant, as shown by the record.

The court must be satisfied, and for the reasons stated
 in the opinion it is not necessary to consider the facts at this
 time.

The judgment for the defendant is reversed and the
 cause remanded for a further trial.

REVEREND THE COURT.

WILSON AND HALL, JJ. CONCUR.

37700

JAMES L. COOKE and ELSIE MAIN COOKE,
Appellees,

v.

DAVID A. BADENOCH, et al.,
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

281 I.A. 601²

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a decree setting aside a certain contract on the ground of fraud and for the payment to the complainants, James L. Cooke and Elsie Main Cooke, his wife, of \$332,782.12 by the defendants, C. D. Robbins, H. A. Throckmorton, S. E. Allen, H. W. Gillen, J. A. Winne, and C. B. Campbell, as copartners in the New York brokerage firm of Charles D. Robbins & Co., and David A. Badenoch, co-defendant, who is here on separate appeal.

The Chancellor heard the evidence in support of the amended and supplemental bill and the answer of the respective defendants thereto. It is charged in the amended and supplemental bill that as a result of the stock market break in the fall of 1929, the complainant, James L. Cooke, entered into a written contract on April 17, 1929, with Badenoch, pursuant to the terms of which they became partners in the stock brokerage business in Chicago; that business was conducted under that agreement until the written contract dated January 2, 1930.

It is further charged that as a result of the market break in the fall of 1929, the Cooke firm's capital became seriously impaired so that the New York Stock Exchange could have required the firm's liquidation or the taking over of its assets by another stock exchange firm; that as a result thereof the complainant James L. Cooke

[illegible]

2008-09-01

• v

4427 IN 1500000 + 1146

• 2011-12-19

102 A.I.F.S

Opinion filed June 26, 1935

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This is a report by the staff of the

the agent will not be held to honor and a reasonable notice is given

to the complainant, James J. O'Keefe and his wife, Mrs. O'Keefe, by the defendant, D. J. Connelley, Jr., Treasurer.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

cooperators in the New York location. A list of names is

1897

The Chancellor heard the evidence in the month of

the said [redacted] and [redacted] are hereby notified that they shall be held responsible for the same.

and, 1941 to 1942 not in favor of the war.

on 12/10/1964, 12/11/1964, 12/12/1964, 12/13/1964, 12/14/1964, 12/15/1964, 12/16/1964, 12/17/1964, 12/18/1964, 12/19/1964, 12/20/1964, 12/21/1964, 12/22/1964, 12/23/1964, 12/24/1964, 12/25/1964, 12/26/1964, 12/27/1964, 12/28/1964, 12/29/1964, 12/30/1964, 12/31/1964, 1/1/1965, 1/2/1965, 1/3/1965, 1/4/1965, 1/5/1965, 1/6/1965, 1/7/1965, 1/8/1965, 1/9/1965, 1/10/1965, 1/11/1965, 1/12/1965, 1/13/1965, 1/14/1965, 1/15/1965, 1/16/1965, 1/17/1965, 1/18/1965, 1/19/1965, 1/20/1965, 1/21/1965, 1/22/1965, 1/23/1965, 1/24/1965, 1/25/1965, 1/26/1965, 1/27/1965, 1/28/1965, 1/29/1965, 1/30/1965, 1/31/1965, 2/1/1965, 2/2/1965, 2/3/1965, 2/4/1965, 2/5/1965, 2/6/1965, 2/7/1965, 2/8/1965, 2/9/1965, 2/10/1965, 2/11/1965, 2/12/1965, 2/13/1965, 2/14/1965, 2/15/1965, 2/16/1965, 2/17/1965, 2/18/1965, 2/19/1965, 2/20/1965, 2/21/1965, 2/22/1965, 2/23/1965, 2/24/1965, 2/25/1965, 2/26/1965, 2/27/1965, 2/28/1965, 2/29/1965, 3/1/1965, 3/2/1965, 3/3/1965, 3/4/1965, 3/5/1965, 3/6/1965, 3/7/1965, 3/8/1965, 3/9/1965, 3/10/1965, 3/11/1965, 3/12/1965, 3/13/1965, 3/14/1965, 3/15/1965, 3/16/1965, 3/17/1965, 3/18/1965, 3/19/1965, 3/20/1965, 3/21/1965, 3/22/1965, 3/23/1965, 3/24/1965, 3/25/1965, 3/26/1965, 3/27/1965, 3/28/1965, 3/29/1965, 3/30/1965, 3/31/1965, 4/1/1965, 4/2/1965, 4/3/1965, 4/4/1965, 4/5/1965, 4/6/1965, 4/7/1965, 4/8/1965, 4/9/1965, 4/10/1965, 4/11/1965, 4/12/1965, 4/13/1965, 4/14/1965, 4/15/1965, 4/16/1965, 4/17/1965, 4/18/1965, 4/19/1965, 4/20/1965, 4/21/1965, 4/22/1965, 4/23/1965, 4/24/1965, 4/25/1965, 4/26/1965, 4/27/1965, 4/28/1965, 4/29/1965, 4/30/1965, 5/1/1965, 5/2/1965, 5/3/1965, 5/4/1965, 5/5/1965, 5/6/1965, 5/7/1965, 5/8/1965, 5/9/1965, 5/10/1965, 5/11/1965, 5/12/1965, 5/13/1965, 5/14/1965, 5/15/1965, 5/16/1965, 5/17/1965, 5/18/1965, 5/19/1965, 5/20/1965, 5/21/1965, 5/22/1965, 5/23/1965, 5/24/1965, 5/25/1965, 5/26/1965, 5/27/1965, 5/28/1965, 5/29/1965, 5/30/1965, 5/31/1965, 6/1/1965, 6/2/1965, 6/3/1965, 6/4/1965, 6/5/1965, 6/6/1965, 6/7/1965, 6/8/1965, 6/9/1965, 6/10/1965, 6/11/1965, 6/12/1965, 6/13/1965, 6/14/1965, 6/15/1965, 6/16/1965, 6/17/1965, 6/18/1965, 6/19/1965, 6/20/1965, 6/21/1965, 6/22/1965, 6/23/1965, 6/24/1965, 6/25/1965, 6/26/1965, 6/27/1965, 6/28/1965, 6/29/1965, 6/30/1965, 7/1/1965, 7/2/1965, 7/3/1965, 7/4/1965, 7/5/1965, 7/6/1965, 7/7/1965, 7/8/1965, 7/9/1965, 7/10/1965, 7/11/1965, 7/12/1965, 7/13/1965, 7/14/1965, 7/15/1965, 7/16/1965, 7/17/1965, 7/18/1965, 7/19/1965, 7/20/1965, 7/21/1965, 7/22/1965, 7/23/1965, 7/24/1965, 7/25/1965, 7/26/1965, 7/27/1965, 7/28/1965, 7/29/1965, 7/30/1965, 7/31/1965, 8/1/1965, 8/2/1965, 8/3/1965, 8/4/1965, 8/5/1965, 8/6/1965, 8/7/1965, 8/8/1965, 8/9/1965, 8/10/1965, 8/11/1965, 8/12/1965, 8/13/1965, 8/14/1965, 8/15/1965, 8/16/1965, 8/17/1965, 8/18/1965, 8/19/1965, 8/20/1965, 8/21/1965, 8/22/1965, 8/23/1965, 8/24/1965, 8/25/1965, 8/26/1965, 8/27/1965, 8/28/1965, 8/29/1965, 8/30/1965, 8/31/1965, 9/1/1965, 9/2/1965, 9/3/1965, 9/4/1965, 9/5/1965, 9/6/1965, 9/7/1965, 9/8/1965, 9/9/1965, 9/10/1965, 9/11/1965, 9/12/1965, 9/13/1965, 9/14/1965, 9/15/1965, 9/16/1965, 9/17/1965, 9/18/1965, 9/19/1965, 9/20/1965, 9/21/1965, 9/22/1965, 9/23/1965, 9/24/1965, 9/25/1965, 9/26/1965, 9/27/1965, 9/28/1965, 9/29/1965, 9/30/1965, 10/1/1965, 10/2/1965, 10/3/1965, 10/4/1965, 10/5/1965, 10/6/1965, 10/7/1965, 10/8/1965, 10/9/1965, 10/10/1965, 10/11/1965, 10/12/1965, 10/13/1965, 10/14/1965, 10/15/1965, 10/16/1965, 10/17/1965, 10/18/1965, 10/19/1965, 10/20/1965, 10/21/1965, 10/22/1965, 10/23/1965, 10/24/1965, 10/25/1965, 10/26/1965, 10/27/1965, 10/28/1965, 10/29/1965, 10/30/1965, 10/31/1965, 11/1/1965, 11/2/1965, 11/3/1965, 11/4/1965, 11/5/1965, 11/6/1965, 11/7/1965, 11/8/1965, 11/9/1965, 11/10/1965, 11/11/1965, 11/12/1965, 11/13/1965, 11/14/1965, 11/15/1965, 11/16/1965, 11/17/1965, 11/18/1965, 11/19/1965, 11/20/1965, 11/21/1965, 11/22/1965, 11/23/1965, 11/24/1965, 11/25/1965, 11/26/1965, 11/27/1965, 11/28/1965, 11/29/1965, 11/30/1965, 12/1/1965, 12/2/1965, 12/3/1965, 12/4/1965, 12/5/1965, 12/6/1965, 12/7/1965, 12/8/1965, 12/9/1965, 12/10/1965, 12/11/1965, 12/12/1965, 12/13/1965, 12/14/1965, 12/15/1965, 12/16/1965

April 17, 1969, with [redacted] and [redacted]

become artists in the same profession as before; the

business was conducted under the name of the

.0001 " vt mcl total jo 17:00

100-443887-100

in the fall of 1953, the Cooke family moved to

1. I am not a member of the Communist Party, nor have I ever been a member of the Communist Party.

11-11-61

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was in a "serious mental and nervous condition;" that the complainant James L. Cooke and Elsie Main Cooke, his wife, placed reliance and trust in Badenoch, and that he occupied a fiduciary relationship to them, and that Badenoch exaggerated to the complainants the seriousness of the firm's financial condition, and secured the consent of the complainants that he go to New York to see the Exchange officials and attempt to procure a New York firm to liquidate the Cooke firm's assets.

It is further charged that at about this time he conceived the plan of procuring for himself a partnership in a New York firm on the basis of turning into such firm the assets of James L. Cooke & Company; that while in New York he met the New York defendants then composing the copartnership of Charles D. Robbins & Co.; that on or about December 15, 1929, he entered into a conspiracy with said defendants that he and said defendants should acquire all of the capital and assets of the complainants without paying any consideration therefor; that all of the representations made by Badenoch to the complainants were made pursuant to said conspiracy and as a part thereof.

The contract between the Cooke firm and the Robbins firm and the contract and supplemental contract between Cooke and Badenoch were attached to the bill, and it is alleged in the bill that certain of the provisions of the contract between Badenoch and James L. Cooke relating to the inclusion of various stipulations in the contemplated new partnership agreement between Badenoch and the New York defendants were not complied with; that those provisions constituted not only promises but representations by Badenoch; that such representations were part of the conspiracy; that the defendants did not intend, and wilfully omitted, to comply with those provisions; that this omission not only constituted a breach of Badenoch's contract, but a fraud for which not only Badenoch but also the New York defendants were liable.

and attempt to procure a New York firm to liquidate the Cooke firm's
the complaints that he had to New York to see the Exchange official
ness of the firm's financial condition, and secured the consent of
them, and that he had been expected to the liquidation of the various
trust in London, and that he could not find a satisfactory relationship to
James L. Cooke and also to the Cooke, his wife, official relations and
was in a position to find out the truth about the Cooke firm's condition

the complainants were made pursuant to said conspiracy and so a part
tion therefor; that all of the representations made by defendant to
capital and assets of the complainants without paying any consideration
said defendants that he and said defendants would receive all of the
on or about December 10, 1933, he entered into a conspiracy with
than composing the corporation of Charles D. Rosenberg & Co.; that
a Company; that while in New York he met the New York defendants
on the basis of turning into them the assets of James A. Quinn
the plan of procuring for himself a partnership in a New York firm
assets. It is further charged that at about this time he conspired

The contract between the Cable firm and the shipping firm
and the contract and agreement entered into between Cable and Johnson
were attached to the bill, and it is alleged by the bill that certain
of the provisions of the contract between Johnson and James L. Locke
relating to the inclusion of various officials in the contemplated
new partnership agreement between Johnson and the new cable company
were not complied with; that those provisions constituted not only
promises but represent things by Johnson; that such representations
were part of the conspiracy; that the defendants did not ignore,
and willfully omitted, to comply with those conditions; that this
constituted a not only constituted a breach of Johnson's contract, but
a fraud upon which not only Johnson but also the four defendants
were liable.

The bill further charges that the contracts between Badenoch and Cooke were unconscionable, and that as soon as the "nervous and mental condition" of the complainant James L. Cooke became somewhat improved he proceeded to investigate as far as possible the representations made to the complainants by Badenoch and upon learning of their falsity on the 3rd day of June, 1930, caused their solicitors to send a letter to the Robbins firm electing to rescind the contract on account of fraud.

The prayer of the bill asks that the contracts be set aside and that an accounting be had; that a receiver be appointed, and that the defendants be enjoined from disposing of any of the properties placed in their possession pursuant to the terms of said written contracts.

The answer filed on behalf of all the defendants denies all charges of conspiracy and fraud and sets up affirmatively the good faith of the defendants; denies that the contracts should be set aside, and further denies that the complainants were entitled to an accounting.

The Chancellor proceeded to the taking of testimony in this case upon the charges contained in the amended and supplemental bill by deposition, as well as by the appearance of witnesses in court. Hearing of evidence was concluded on January 13, 1933. After considering all the evidence and such exhibits as were introduced, the court entered a decree on March 31, 1934, from which the defendants appeal.

Prior to the execution of the contract on January 2, 1930, the defendant Badenoch, as a friend of the complainants, undertook to adjust certain disagreements between the complainant James L. Cooke and Charles S. Packer, who was then a partner of the complainant James L. Cooke in the stock and bond brokerage business in Chicago. After several negotiations, which led to the dissolution of this firm,

The bill further provides that the complaint against
 Galtman and Galtman were inadmissible, and that as soon as the
 "nervous and mental condition" of the complainant James L. Galtman
 became somewhat improved he proceeded to investigate as far as possible
 the representations made to the complainant by Galtman and Galtman
 learning of their falsity on the first day of June, 1937, caused their
 solicitors to send a letter to the Galtman firm electing to rescind
 the contract on account of fraud.

The prayer of the bill asks that the contract be set aside
 and that an accounting be had; that a receiver be appointed, and
 that the defendant be enjoined from disposing of any of the properties
 placed in their possession pursuant to the terms of said written
 contracts. The answer filed on behalf of all the defendants denies
 all charges of conspiracy and fraud and sets up affirmatively the
 good faith of the defendant; denies that the contracts should be
 set aside, and further denies that the complainants were entitled to
 an accounting.

The counsel proposed on the behalf of plaintiff in
 this case upon the charges contained in the answer and amendments
 still by deposition, as well as by the appearance of witnesses in
 court. Hearing of evidence was concluded on January 15, 1937, 1937
 considering all the evidence and the bill filed in court.
 The court entered a decree on March 11, 1937, from which the defendant
 appeals.

Prior to the execution of the contract on January 7, 1937,
 the defendant Galtman, as a friend of the complainant, advised
 to adjust certain discrepancies between the complainant James L.
 Galtman and Charles G. Galtman, who was then a partner in the complainant
 James L. Galtman in the Galtman and Galtman business in Chicago.
 After several negotiations, which led to the disposition of this firm,

Badenoch was allowed \$25,000 for his services in negotiating and adjusting the differences between Cooke and Packer. Thereafter, the complainant, James L. Cooke, invited Badenoch to become a partner in this brokerage business, and a partnership contract, dated April 17, 1929, was entered into by Cooke and Badenoch. The \$25,000 which was due from the complainant James L. Cooke and agreed to be paid by him to Badenoch was allowed to become a part of Badenoch's contribution to this business.

Early in October, 1929, Badenoch learned that his partner Cooke had violated the partnership agreement by speculating. The provision of the contract which was violated is as follows:

"Eleventh: The partnership shall not, nor shall either of the partners hereto, conduct on behalf of the firm, or on his own behalf, or on behalf of any member of his family, in any manner whatsoever, either directly or indirectly, any purchases, sales, options, dealings or trades in the nature of speculation in stocks, bonds, securities, grain, cotton, sugar or other commodities."

It appears from the partnership books that James L. Cooke carried the account in the name of his wife, and later under "No. 44 Account." Badenoch took this up with Cooke and told him that he did not consent to his speculating. About October 20th the market crashed. The days following were exciting ones for the brokerage business. Further breaks occurred on the 8th and 9th of November. Both Cooke and Badenoch understood, and there seems to be no dispute, that after the November break in the stock market the "free capital" of the firm was entirely exhausted and they were "into their New York Stock Exchange seat" to the extent of \$50,000 or more. From the audit of the affairs of James L. Cooke & Company, as of December 31, 1929, it appears that the amount of the deficit was more than \$75,000. From this state of affairs and from the evidence of James L. Cooke, it appears that Cooke knew at that time that there was a deficit in the firm's capital of more than \$50,000, and that he had lost from

Johnson was allowed \$10,000 for his services in negotiating and adjusting the differences between Jack and Johnny. The complaint, dated 1. 1935, stated Johnson to receive a contract in this business, and a partnership agreement, dated 1935, IV, 1935, was entered into by Jack and Johnson. The \$10,000 which was due from the defendant Jack L. Johnson and a check to be paid by him to Johnson was allowed to become a part of Johnson's contribution to this business.

Early in October, 1935, Johnson learned that his partner Jack had violated the partnership agreement by speculating. The provision of the contract which was violated is as follows: "Element: The partnership shall not, nor shall either of the partners hereto, conduct on behalf of the firm, or on his own behalf, or on behalf of any member of his family, in any manner whatsoever, directly or indirectly, any business, which, whether in whole, in part, or in nature of speculation in stocks, bonds, securities, commodities, or in other commodities."

It appears from the partnership book that Jack L. Johnson carried the account in the name of his wife, and later, under the name of "Johnson". Johnson took this up with Jack and told him that he did not consent to his speculation. Jack, however, did not work around. The days following were exciting ones for the stock market. Speculation occurred on the 24th and 25th of November. When Jack and Johnson understood, and there seems to be no dispute, that they had lost over one-third of the stock market the "free capital" of the firm was entirely exhausted and they were "into their own backs". Johnson went to the extent of \$50,000 or more. From the audit of the affairs of Jack L. Johnson, dated 11 December 1935, it appears that the amount of the deficit was more than \$100,000. This state of affairs was from the witness of Jack L. Johnson, at the time of the audit, and that they were "into their own backs". The firm's capital of more than \$100,000, and that he was lost.

\$95,000 to \$100,000 in stock market speculation, and that customers' accounts were \$105,000 in the "red".

As a result of meetings between both the complainants and Badenoch, it appears from the record that Badenoch was requested and finally arranged to leave for New York to take up the question with the New York Stock Exchange officials of the financial condition of the James L. Cooke & Company brokerage concern, and that in leaving for New York he did so with the consent not only of James L. Cooke, but also of Mrs. Elsie Main Cooke, his wife.

Upon Badenoch's arrival in New York on December 2, 1929, he visited the New York Stock Exchange, and met Richard Whitney, who was the Chairman of the Business Conduct Committee of the New York Stock Exchange. Badenoch at that time told Whitney that because of the "red" accounts and the large personal loss sustained by Cooke, the firm of Cooke and Company was \$50,000 to \$75,000 "into its seat," meaning that such sum is a charge against the membership of James L. Cooke in the New York Stock Exchange.

After an examination by an accountant for the New York Exchange of the figures furnished by Badenoch, he Badenoch returned to Whitney's office, where Whitney stated: "Either you must get more capital in the business or liquidate it." After some discussion between Badenoch and Whitney regarding the taking over of the Cooke brokerage business, Badenoch visited the office of Charles D. Robbins & Company by appointment made by Whitney.

After a conversation with Robbins, Badenoch had a telephone conversation with Cooke, and told him about the talk he had with Robbins, and also with Whitney; that Whitney representing the Stock Exchange required an assignment of Cooke's membership. Badenoch visited several brokerage houses during the several days he was in New York, but none of the concerns seemed interested except the firm

\$25,000 to \$100,000 in stock market speculation, and told witnesses accounts were \$100,000 in the first.

As a result of meeting between Cook and Hadenoch, it was said that the money that Hadenoch was receiving was typically arranged to leave for New York in the summer of 1935. The New York Stock Exchange advised of Hadenoch's condition at the time I. Cooke & Company advised, and that in leaving for New York he did not with the consent not only of James I. Cooke, but also of Mrs. Alice Alice Cooke, his wife.

Upon Hadenoch's arrival in New York in December, 1935, he visited the New York Stock Exchange, and met various officials, who were the Chairman of the Business Council Committee of the New York Stock Exchange. Hadenoch at that time told Hadenoch of the "red" accounts and the large personal loss sustained by James I. Cooke and Company was \$25,000 to \$75,000 "into the deal," meaning that such sum is a charge against the membership of James I. Cooke in the New York Stock Exchange.

After an examination of an account for the New York Exchange of the figures furnished by Hadenoch, an account was sent to Hadenoch's office, where Hadenoch stated: "I have seen and have replied in the business of the account is." After some discussion between Hadenoch and Hadenoch, Hadenoch stated that the money was given to Hadenoch, Hadenoch visited the office of Hadenoch & Company by appointment with Hadenoch.

After a conversation with Hadenoch, Hadenoch was a conversation with Cooke, and told him about the deal he was with Hadenoch, and also with Hadenoch; that Hadenoch was responsible for the exchange was an account of Cooke's account. Hadenoch visited several private houses during the several days he was in New York, but none of the accounts were introduced during the time.

of Robbins & Company, and after negotiations were had between Robbins and Badenoch a contract was entered into by the plaintiffs and the defendants.

During prior negotiations between the parties in interest, it appears that Badenoch advised Robbins that he was carrying on negotiations for the firm of Cooke & Company because Cooke was in a disturbed condition, which resulted from the market break and worry over his personal losses in speculation. He told Robbins that any proposed agreement would have to be subject to Cooke's approval, and he at the time advised Robbins that Mrs. Cooke was the principal owner of the assets of Cooke & Company, and that he wanted primarily to protect her interest.

During the negotiations which took place prior to the signing of the contract between the plaintiffs and the defendants, Robbins & Company insisted that ample time be allowed to complete the liquidation of the assets of Cooke & Company. Robbins advised Badenoch that Robbins' firm would not take over Cooke & Company without a resident partner in Chicago to take over the Chicago business. In the negotiations Robbins asked Badenoch whether he would be willing to be the Chicago partner and told him that the Robbins' firm would not take a partner without an investment of \$100,000 in the capital of the firm. Everything that was done or said in the negotiations with Robbins & Company was done on a tentative basis, subject to Cooke's approval, and on Saturday, December 14, 1929, Badenoch and Robbins, having come to a tentative understanding as to the terms upon which the Robbins' firm would take over and administer Cooke's assets, left together for Chicago. Robbins brought with him Accountant Ritter and also a clerk in his office. They spent the following day in Cooke's office going over the Company's accounts. Upon the request of Badenoch, Robbins addressed a letter to Cooke, which was received

of Robbins & Company, and after negotiations were had between Robbins and Sedgwick a contract was entered into by the plaintiffs and the defendants.

During the negotiations between the parties in interest, it appears that Sedgwick advised Robbins that he was carrying on negotiations for the firm of Cooke & Company because Cooke was in a disturbed condition, which resulted from the market crash and worry over his personal losses in speculation. He told Robbins that any proposed agreement would have to be subject to Cooke's approval, and he at the time advised Robbins that Mrs. Cooke was the principal owner of the assets of Cooke & Company, and that he wanted primarily to protect her interest.

During the negotiations which took place prior to the signing of the contract between the plaintiffs and the defendants, Robbins & Company insisted that ample time be allowed to complete the liquidation of the assets of Cooke & Company. Robbins advised Sedgwick that Robbins' firm would not take over Cooke & Company without a resident partner in Chicago to take over the Chicago business. In the negotiations Robbins asked Sedgwick whether he would be willing to be the Chicago partner and told him that the Robbins' firm would not take a partner without an investment of \$100,000 in the capital of the firm. Everything was done or will in the negotiations with Robbins & Company was done on a tentative basis, subject to Cooke's approval, and on January 12, 1933, Sedgwick and Robbins, having come to a tentative understanding as to the terms upon which the Robbins' firm would take over and administer Cooke's business, left together for Chicago. Robbins wrote to his associates in New York and also a check in his office. They went for Robinson and in Cooke's office going over the company's accounts. Upon the return of Sedgwick, Robbins addressed a letter to Cooke, which was received

guaranteeing
by him, that an audit would show the amount of the assets of Robbins
& Company to be \$600,000. The letter is as follows:

"December 19, 1929.

James L. Cooke, Esq.
231 South La Salle Street
Chicago, Illinois

Dear Sir:

In view of the fact that it is not possible for us to have an audit of our books at this day, we cannot submit a balance sheet reflecting our exact position, but careful analysis of our accounts shows that as of today and estimated to December 31, 1929, our net worth, after writing off all losses, bad accounts, etc. is \$600,000.

We guarantee this amount will not be substantially changed by a certified audit to be made as of the close of business December 31, 1929."

The audit was made and certified to by Arthur Young & Company as an audit of the Robbins' firm as of the close of business December 31, 1929, and it appears from this audit that the value of the assets of this firm on that day was over \$998,000.

Upon an examination of this audit Ritter, Robbins' accountant, made up an adjusted statement based on this auditors' report, in which he treated all unsecured accounts as valueless, wrote down fifty per cent of the net debit balance in all undermargined customers' accounts and wrote down all firm trading accounts, including settlement accounts of prior partnerships, to the value of the securities held in those accounts, thus arriving at a net worth of \$643,423.86.

On Sunday evening, December 15, 1929, about 10:30 o'clock, Badenoch visited Cooke's home. He told them in chronological order everything that occurred in New York. He advised Mr. and Mrs. Cooke that Robbins & Company would not take over the business unless he remained as the resident partner in Chicago; and that Badenoch would be required to make a capital contribution of \$100,000. Cooke said he thought \$100,000 was altogether too much. Thereupon Badenoch advised Cooke that he had \$25,000 coming which had not been settled,

by which the amount of the assets of the company is as follows:

December 31, 1922.

James L. Woods, Esq.
221 North La Salle Street
Chicago, Illinois

Dear Sir:

In view of the fact that it is not possible for us to have an audit of our books at this time, we cannot make a balance sheet reflecting our exact position, but careful analysis of our accounts shows that as at today and adjusted to December 31, 1922, our net worth, after setting off all losses, accounts, etc., is \$100,000. We understand this amount will not be substantially changed by a certified audit to be made at the close of business December 31, 1922.

The audit was made and certified to by Arthur Young &

Company as an audit of the balance sheet as of the close of business

December 31, 1922, and it is requested that this audit be the basis of

the assets of this firm on that day and over \$100,000.

Upon an examination of this audit letter, Robbins' accountants,

made us an adjusted statement based on this audit report, in

which he treated all unadjusted accounts as liabilities, except those which

per cent of the net debit balance in all unadjusted statements.

Robbins and wrote down all the trading accounts, including

accounts of other companies, to the value of the assets held

in these accounts, thus creating a net worth of \$100,000.

On Sunday evening, December 17, 1922, about 10:30 o'clock,

Robinson visited Woods' home. He told me in confidential terms

everything that occurred in the past. He stated that the

the Robbins & Company would not take over the business unless

remained as the resident partner in the company; that the

be required to make a capital contribution of \$100,000. Woods

he thought \$100,000 was a fair amount for the business.

Robbins told me that he had \$100,000 which had been

and that he would be willing to contribute that amount toward the \$100,000 which was required. Badenoch stated that in his opinion the Cookes should get from \$200,000 to \$250,000 net out of the deal, and that with a guaranteed return of ten per cent on this amount of money he thought it was a good proposition.

The plaintiffs retained E. L. Millard as their attorney, and he, during part of the negotiations and prior to the execution of the contract between them and the Robbins firm, advised with the plaintiffs. The contract, which was the culmination of the previous negotiations between Badenoch and the members of the Robbins firm, was substantially in the following form, and provided, in substance -

"Par. 1. The Cooke firm transfers all its assets as of December 31, 1929, to the Robbins firm.

Par. 2. These assets are to be set up on the books of the Robbins firm as 'David A. Badenoch Special Capital Account.' Out of this capital the Robbins firm will pay all debts appearing on the Cooke firm's books and other obligations which may be successfully asserted at any time against the Cooke firm including Packer's claim.

Par. 3. The stock exchange membership of the Cooke firm shall be sold and the proceeds credited to the Special Capital Account.

Par. 4. The Robbins firm 'shall, as soon as practicable, sell and dispose of the capital assets.'

Par. 5. The Robbins firm shall have full power and authority to deal with the assets turned in.

Par. 6. The memberships of Cooke in the Chicago Board of Trade and in the Chicago Stock Exchange shall become the property of Badenoch.

Par. 7. There shall also be transferred to Badenoch from the Special Capital Account \$50,000, which amount together with the Chicago Stock Exchange and Chicago Board of Trade Memberships (total value \$100,000.) constitute the investment of Badenoch individually in the new firm of Charles D. Robbins & Co. to be formed by the present partners in that firm and Badenoch.

Par. 8. Furniture and fixtures of the Cooke firm shall be purchased by the Robbins firm for \$10,000.

Par. 9. All expenses of liquidation including attorneys' fees and a reasonable compensation shall be charged to the Special Capital Account.

Par. 10. Cooke assigns to Badenoch all interest in the net credit balance in the Special Capital Account which net credit balance shall become an additional contribution of Badenoch to the new firm of Charles D. Robbins & Co.

'First parties shall be under no obligation whatsoever to said James L. Cooke or to Elsie Main Cooke on account of such contribution of capital or any such additional contribution of capital to said first parties or otherwise, with

respect to this agreement, and no notice or anything contained in any other agreement between said James L. Cooke and/ or Elsie Main Cooke and/ or David A. Badenoch shall be deemed to affect in any respect the provisions of this agreement or the obligations of first parties thereunder.'

Par. 11. 'Any partnership agreement between David A. Badenoch and first parties shall contain a provision in substance that on the 1st day of each and every month beginning January 1st, 1930, and as long as there shall remain any net credit balance in the special capital account, after charging and/ or paying all liabilities and debts which are charged or might at some future time be chargeable to the same, as shown on the books of the first parties, first parties shall pay to David A. Badenoch an amount equal to one-twelfth of ten per cent. of said net balance.'

* * * * *

Par. 14. 'The term, "first parties" as used herein shall be deemed, where applicable, to include the partners of Charles D. Robbins & Co., as now or at any time or times hereafter constituted.'

This contract was forwarded to the plaintiffs in Chicago, executed by the several members of the New York firm, and after its arrival the plaintiffs advised with not only Milliard, but also with James B. Wescott, an attorney, regarding the execution of this contract forwarded from New York.

It appears that prior to the execution of the contract by the plaintiffs an unfriendly feeling had developed between Badenoch and the plaintiff, and when the contracts were signed they acted on the advice of the attorneys, who considered the documents in the form in which they were received.

At the time the contract was executed between the members of the firm of Robbins & Company and the plaintiffs, there was also executed a contract by Badenoch and the plaintiffs, which contains, in substance, the negotiations had between the plaintiffs and the defendant Badenoch.

After these contracts were executed by the parties, in the performance of the contract, Charles D. Robbins & Company began liquidation of the securities of James L. Cooke & Company. Some of the securities were sold immediately and others were sold at varying

will be unable to correct any errors and the situation could be worsened by the publication of first results. I think, however, that a preliminary report of the results would be of great value to the community and would not be a waste of time. I think that the results of the first results would be of great value to the community and would not be a waste of time.

[illegible]

1. The first condition is that the person must be a citizen of the United States.

This contract was forwarded to the District Attorney, New York, for his consideration. The contract was also forwarded to the Board of Directors of the New York State Bar Association, and after its approval, the contract was signed by the Board of Directors of the New York State Bar Association, and after its approval, the contract was signed by the Board of Directors of the New York State Bar Association.

It appears that prior to the execution of the contract by the Louisville an anticompetitive feeling was developed between defendant and the plaintiff, and when the contract was signed they acted in the interest of the plaintiff, and not in the interest of the defendant in the form in which they were made.

in substance, the relationship between the individual and the

the scientific work and especially the other work of the
 institution in the summer of 1964. In 1965, and in
 the summer of the summer, during a period of about 10
 After these changes were made in the summer, in

intervals. Accounts were collected and obligations were paid. All of the assets of Cooke & Company were carried in the Badenoch Special Capital Account upon the books of Robbins & Company of New York. It also appears from the evidence that monthly statements were sent to Mrs. Cooke, together with remittances for one-twelfth of ten per cent of the net balance in the Special Capital Account, as shown in the statement for the month. From the record it appears that for several months plaintiffs accepted the benefits provided for under the contract executed by them, that on May 12, 1930, after the plaintiffs had written a letter, by their attorneys, directed to Gilman & Unger, the New York attorneys for Robbins & Company, in which it was stated that the plaintiffs elected to rescind the contract. This action was instituted by the plaintiffs, on August 6, 1930, seeking rescission of the contract in question.

The general rule that a fraudulent representation which induces one to enter into a contract violates such contract, may be a correct statement of the rule, provided of course the representation was made without the knowledge of its falsity and was the moving cause that induced a party to enter into a contract with a person making such fraudulent representation. While this is the true rule, the New York defendants, as designated for brevity, cannot be charged with a fraud made without their knowledge, and which it was claimed was made by Badenoch to induce the making of the contract. Badenoch sustained a fiduciary relation to the plaintiffs. He was one of the partners designated to adjust the financial difficulties of the firm of James L. Cooke & Company. This condition was brought about by the co-plaintiff James L. Cooke by use of the partnership funds for personal stock transactions, which resulted in a loss, and depleted the firm's resources which together with the stock market crash, brought about the difficulties and made it necessary for someone to adjust the firm's liabilities. No doubt, co-plaintiff James L. Cooke

accounts were collected and distributed among the
 of the accounts of James L. Cooke & Company were carried in the accounts of the
 hospital account upon the books of Cooke & Company at New York.
 It also appears from the evidence that monthly statements were sent
 to Mr. Cooke, together with the statement for one-twelfth of the
 per cent of the net income in the local hospital account, as shown
 in the statement for the month. When the hospital account is lost for
 several months plaintiffs recovered the benefits provided for under
 the contract executed by them, that on May 11, 1910, after the
 plaintiffs had written a letter, by their attorneys, directed to
 William A. Barker, the New York attorney for Cooke & Company, in
 which it was stated that the plaintiffs desired to revoke the
 contract. This action was instituted by the plaintiffs, on August
 6, 1910, seeking rescission of the contract in question.
 The general rule that a fraudulent representation which
 induces one to enter into a contract violates such contract, may be
 a correct statement of the rule, provided of course the representation
 was made without the knowledge of its falsity and was the moving
 cause that induced a party to enter into a contract with a person
 making such fraudulent representation. While this is the true rule,
 the New York courts, as hereinafter for brevity, cannot be charged
 with a broad rule without fairly reading, and which is not clearly
 and made by reference to the nature of the contract. Numerous
 contracts a fraudulent statement as to the plaintiff. As one of the
 partners designated to sign the financial statement of the firm
 of James L. Cooke & Company. The defendant was brought about by
 the co-defendant James L. Cooke by one of the partners who made the
 personal check transaction, which resulted in a loss, and collected
 the firm's resources which together with the stock market again,
 brought about the dissolution and made it necessary for accounts to
 adjust the firm's liabilities, as shown, co-defendant James L. Cooke

was distressed by the financial loss which created a business condition that needed attention. The plaintiffs having knowledge of the business affairs and the financial difficulties under which the firm was laboring, not alone consented to, but suggested that Badenoch leave for New York and take steps to avoid the loss of co-plaintiff, James L. Cooke's membership in the New York Stock Exchange, and also to arrange, if possible, for the liquidation of the firm's assets and avoid the appointment of a receiver for the firm. The plaintiffs well knew the purpose and object of Badenoch's visit to New York. The net result of his negotiations was the consummation of a contract with the New York defendants. During the negotiations with this firm, there is no evidence that these defendants made false representations to the plaintiffs. Plaintiffs had no dealings with them, and there is no evidence that anyone of the New York defendants acted in any manner to induce the execution of the contract.

The plaintiffs lay particular stress upon a letter signed by C. D. Robbins regarding the net value of the assets of the firm of which he was a member. The tenor of this letter is to the effect that such net value would be \$600,000. The audit made by Arthur Young & Company accountants, would indicate that the value of the assets was above \$900,000, and even after certain deductions were made by the accountant of the Robbins firm, the value of the assets was still above the amount fixed in the letter.

The outstanding fact in this case is that after a tentative agreement was reached by the parties, the plaintiffs had knowledge of the terms. They did not rely upon Badenoch's statement, but received outside advice, not only from lawyers who were acting for them, but also from friends, all of whom advised them to sign the draft of the contract with C. D. Robbins & Company and also with the defendant Badenoch.

was distressed by the financial loss which accrued to the business community that needed attention. The plaintiff's business community of the business affairs and the financial difficulties under which the firm was laboring, not alone consented to, but suggested that Bedonch leave for New York and take steps to avoid the loss of co-plaintiff, James A. Goeke's membership in the New York Stock Exchange, and also to arrange, if possible, for the liquidation of the firm's assets and avoid the payment of a liability for the firm. The plaintiff well knew the purpose and object of Bedonch's visit to New York. The net result of his negotiations was the consummation of a contract with the New York defendants. During the negotiations with this firm, there is no evidence that there had been any made false representations to the plaintiff. Plaintiff had no dealings with them, and there is no evidence that anyone of the New York defendants acted in any manner to induce the execution of the contract.

The plaintiff lay evidence shows upon a letter signed by G. D. Bedonch regarding the net value of the assets of the firm of which he was a member. The value of this letter is to the effect that such net value would be \$200,000. The value was by John Young, a Company accountant, would indicate that the value of the assets was above \$200,000, and even after certain deductions were made by the account of the Bedonch firm, the value of the assets was still above the amount filed in the letter.

The outstanding fact in this case is that after a tentative agreement was reached by the parties, the plaintiff had knowledge of the terms. They did not rely upon Bedonch's statement, but received outside advice, not only from lawyers who were acting for them, but also from friends, all of whom advised them to sign the contract with G. D. Bedonch & Company and also the defendant Bedonch.

Considerable emphasis is placed upon the terms of the contract regarding the capital contribution by Badenoch to the Robbins firm. There was no concealment which prevented them from learning of the true terms, and the contract itself provides for the capital contribution, which contract the plaintiffs signed. They also signed a contract with Badenoch which provides for this contribution. It cannot be said that notwithstanding this knowledge and advice of competent lawyers, they by fraud were deprived of rights to their disadvantage. We must concede that precaution was taken, and the advice of their lawyers was helpful in the consideration of the contracts.

This cause is one of fact, and the facts must support the plaintiffs' charge set forth in the bill. The complaint, if any, regarding the terms of the contracts should have been voiced before the contracts were executed, and not after performance had taken place by the delivery of assets, the sale of some of which had taken place and adjustments made, and then for the first time attempt to cancel the contracts and ask for a return of the assets or for a full accounting as to their value. This would be a shock to good conscience and fair dealing.

While James L. Cooke may have been mentally distressed, still he did not act upon his own judgment, but acted upon the judgment of his lawyers, and also of his friends. It is not contended that James L. Cooke was mentally incapable of transacting business, nor that he did not understand the nature of the business transacted. As we have indicated, he acted only upon the advice of his attorneys. It is apparent from the record that at the time of the execution of the contract the confidence which the plaintiffs had in Badenoch had ceased to exist, and they were not persuaded by Badenoch to sign the contract, but acted upon the advice of their attorneys. This is evident from the record. On December 24, 1929, the plaintiffs talked,

Considerable expense is placed upon the time of the contract regarding the capital contribution by reference to the Robert firm. There was no concealment which prevented the true learning of the true facts, and the contract itself provided for the capital contribution, which contract the Plaintiff signed. They also signed a contract with Johnson which provides for the contribution. It cannot be said that notwithstanding this knowledge and advice of competent lawyers, they by fraud were deprived of rights to their disadvantage. We must concede that concealment was taken and the advice of their lawyers was relied in the consideration of the contracts.

This case is one of fact, and the facts must support the Plaintiff's charge set forth in the bill. The complaint, if any, regarding the terms of the contracts should have been voiced before the contracts were executed, and not after performance had taken place by the delivery of assets, the sale of some of which had taken place and adjustments made, and then for the first time attempt to rescind the contracts and ask for a return of the assets or for a full accounting as to their value. This would be a shock to good conscience and fair dealing.

While James L. Cooke may have been mentally distressed, still he did not act upon the firm judgment, but acted upon the judgment of his lawyers, and also of his friends. It is not contended that James L. Cooke was mentally incapable of transacting business, nor that he did not understand the nature of the business transacted. As we have indicated, he acted only upon the advice of his attorneys. It is apparent from the record that at the time of the execution of the contract the confidence which the Plaintiff had in Johnson and Cooke to exist, and they were not persuaded by Johnson to sign the contract, but acted upon the advice of their attorneys. This is evident from the record. On December 14, 1932, the Plaintiff signed,

at the home of the Cookes, with David P. Stearns and L. H. Frank, brothers-in-law of Mrs. Cooke, about the James L. Cooke & Company business affairs, and discussed the proposed taking over of the business by Charles J. Robbins & Company. In this discussion strong language was used by the parties present regarding the proposed transfer of the business. On Christmas Day a further discussion occurred with J. H. McGill, also a brother-in-law of Mrs. Cooke, and a further discussion with Stearns. At this time James L. Cooke expressed doubt as to whether he could trust Badenoch. The outcome of the gatherings was the retention of lawyers to advise Cooke on these matters.

The contention is made by the plaintiffs that under the contracts Cooke's money was turned over to Badenoch and deposited as a part of the Badenoch personal capital contribution in the New York firm, and the balance deposited as a Special Capital Account in Badenoch's name, and that this was a part of the conspiracy to deprive them of this money. Badenoch did not misappropriate this fund; it was used as provided for by the contract, and also with knowledge of the plaintiffs as to the terms of the contract. There was no connivance in the application of the fund, and there was no fraud practiced by the defendants.

The plaintiffs, however, claim that they were imposed upon by Badenoch, and the fact that lawyers were retained by the plaintiffs, who advised them in regard to the contract, is not conclusive upon the question before this court. This would be so if facts had been concealed and the lawyers were unable to advise properly upon the conditions as they existed, but from the record all the facts were before the attorneys and the provisions of the proposed contracts examined by them before the contracts were executed, and the plaintiffs acted upon this individual advice and acted only when they were advised to do so. They were not prevented from making an individual

at the door of the house, with David A. Stewart and J. B. Jones, brother-in-law of Mr. Jones, about the time it took a morning business affairs, and discussed the proposed taking over of the business by Charles J. Jones & Company. In this discussion Mr. Jones was used by the parties present regarding the proposed transfer of the business. Mr. Jones by a letter of assignment conveyed with J. H. Moffitt, also a brother-in-law of Mr. Jones, and a further discussion with Mr. Jones. At this time Mr. Jones was present as to what he could trust to himself. The object of the parties was the retention of Jones to living down on their father.

The contention is made by the plaintiff that under the contract Jones's money was turned over to the bank and deposited as a part of the Johnson personal capital contribution in the New York firm, and the balance deposited in a special account in the Johnson's name, and that this was a part of the money to be used for the purpose of the bank. Although all the money was turned over to the bank, it was used as provided for by the contract, and also with the knowledge of the plaintiff as to the terms of the contract. There was no evidence in the application of the fact, and there was no fact provided by the defendant.

The plaintiff, however, claims that they were turned over by Johnson, and that they were turned over by the plaintiff, two which were in regard to the contract, is not undenied upon the question before this court. This would be as if Jones had been a partner in the bank and the money was turned over to the bank under the conditions as they existed, but from the record all the facts were before the plaintiff and the provision of the proposed contract was made by them before the contract was executed, and the plaintiff stated upon this individual matter and stated only that they were turned over to the bank. They were not prevented from doing so.

investigation if they desired to inform themselves of the conditions as they then existed between the parties, and if the contracts as drafted did not meet with their approval, they were not obliged to execute the documents, and should have refused to do so.

We have examined the record, and from the facts disclosed are of the opinion that the plaintiffs were not imposed upon. On the contrary they were well advised as to the existing conditions, and continued to accept the benefits of the contract when they received the amounts paid to them each month, until, for reasons best known to themselves, they notified these defendants that they had elected to rescind the contract.

The facts did not justify the entry of the decree, and we are of the opinion that the Chancellor erred in doing so. For the reasons stated the decree is reversed.
WILSON AND HALL, JJ. CONCUR.

DECREE REVERSED.

investigation if they failed to inform themselves of the conditions
as they then existed between the parties, and if for instance
doubted did not meet with their approval, they were not obliged to
execute the document, and should have refused to do so.
It have examined the report, and from the facts disclosed
me of the opinion that the plaintiff was not injured even. In
the contrary they were well advised as to the existing conditions,
and continued to accept the benefits of the contract when they
received the amount paid to them each month, until the person
best known to themselves, they notified these defendants that they
had elected to rescind the contract.

The facts did not justify the entry of the decree, and
we are of the opinion that the defendant's motion is well founded.

The reasons stated the decree is reversed.

ILLINOIS AND HALL, JJ. CONCUR.

JOSEPH A. GAVIN, JR.

37752

CHICAGO PSYCHIATRIC AID SOCIETY,
a corporation,

(Plaintiff) Appellee,

v.

ALEXANDER B. MAGNUS,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

281 I.A. 601³

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered by the court upon a verdict of a jury finding the right of possession of the property described in the plaintiff. The basis of the action is upon a complaint by the plaintiff in a forcible entry and detainer proceeding alleging that the plaintiff was entitled to, and the defendant unlawfully withheld, possession of the premises described in the complaint. No pleadings being required to be filed by the defendant under the Municipal Court rules, none were filed.

In support of this cause, the plaintiff introduced in evidence an order entered in the Circuit Court of Cook County appointing Joseph Osman receiver of the premises in question, and also an order of the same court entered November 10, 1933, authorizing the receiver to enter into a lease for the premises with the Psychiatric Aid Society, a corporation, from October 15, 1933, to November 14, 1934. No written demand for possession upon the defendant was introduced in evidence, nor proof of service of any demand or notice to quit.

This action is for the purpose of dispossessing the defendant of the premises, which he has occupied since the year 1928, and prior to the appointment of the receiver mentioned in the order of the court, which was in evidence. The defendant was also in possession at the time the judgment for possession was entered by the court on the verdict of the jury.

CHICAGO TRADING AND COMMERCE
CORPORATION,

(Plaintiff) vs.

v.

ANDREW D. BARNES,

(Defendant) Appellant.

CHICAGO
COURT

OF CHICAGO.

281 A. 601

Opinion filed June 28, 1935

MR. JUSTICE THOMAS delivered the opinion of the court.

This is an appeal by the defendant from a judgment entered by the court upon a verdict of a jury finding the right of possession of the property described in the complaint. The basis of the action is upon a complaint by the plaintiff in a forcible entry and detainer proceeding alleging that the plaintiff was entitled to, and the defendant unlawfully retained, possession of the premises described in the complaint. No defense being required to be filed by the defendant under the Municipal Court rules, none were filed.

In support of this cause, the plaintiff introduced in evidence an order entered in the Circuit Court of Cook County appointing Joseph Gorman receiver of the premises in question, and also an order of the same court entered November 10, 1933, authorizing the receiver to enter into a lease for the premises with the defendant and society, a corporation, from October 15, 1933, to November 15, 1934. No written lease for possession with the defendant was introduced in evidence, nor proof of notice of any demand or notice to quit.

This action is for the purpose of recovering the defendant of the premises, which he has occupied since the year 1933, and prior to the appointment of the receiver mentioned in the order of the court, when he is evidence. The defendant was also in possession at the time the judgment for possession was entered by the court on the verdict of the jury.

Before this court will consider the merits of the controversy between the plaintiff and the defendant, it will be necessary to consider the pending motion of the plaintiff to dismiss the appeal of the defendant upon the grounds urged.

The grounds urged by the plaintiff are (1) that the judgment was entered on May 11, 1934, in the Municipal Court of Chicago. Thereafter no notice of appeal was filed by the defendant, either in the Municipal Court of Chicago, or in this court; (2) that the defendant failed to comply with the provision of the Civil Practice Act governing the method of appeals.

The right of appeal was prosecuted by the defendant and a bond was filed within five days after the judgment granting possession was entered. This procedure for appeal was provided for by the statute of Forcible Entry and Detainer, which was in force at the time the Civil Practice Act became a part of the law of procedure in this State. It is evident that the Legislature had in mind in the passage of this Civil Practice Act that certain special actions in the matter of appeal were to be governed by the act providing for such actions, and in order to indicate this intent, the legislature provided by Section 1 of the Civil Practice Act - Cahill's Ill. Rev. St. 1933, Chap. 110, Par. 129, the following:

"The provisions of this Act shall apply to all civil proceedings, both at law and in equity, unless their application is otherwise herein expressly limited, in courts of record, except in attachment, ejectment, eminent domain, *** or other actions in which the procedure is regulated by special statutes."

Sub-section 2 of Sec. 31 of the same Act provides:

"Proceedings in attachment, ejectment, eminent domain, forcible entry and detainer * * * or other actions in which the procedure is regulated by special statutes, shall be in accordance with the statutes dealing therewith."

Before this court will consider the merits of the controversy between the plaintiff and the defendant, it will be necessary to consider the pending motion of the plaintiff to dismiss the complaint of the defendant upon the grounds stated.

The grounds urged by the plaintiff are (1) that the complaint was entered on May 11, 1933, in the Federal Court of Chicago, therefor no notice of removal was filed by the defendant, either in the United States District Court of Chicago, or in this court; (2) that the defendant failed to comply with the provisions of the Civil Practice Act governing the method of removal.

The right of removal was preserved by the defendant and a bond was filed within five days after the judgment granting removal was entered. This procedure for removal was provided for by the statute of Illinois, which was in force at the time the Civil Practice Act became a part of the law of procedure in this State. It is evident that the Legislature had in mind in the passage of the Civil Practice Act that certain special matters in the matter of appeal were to be covered by the act providing for such actions, and in order to determine this point, the Legislature provided by Section 1 of the Civil Practice Act - Section 1, Act No. 133, Chap. 122, Vol. 12, the following:

"The provisions of this act shall apply to all civil proceedings, both at law and in equity, unless specifically stated to the contrary. In cases of removal, appeal, or other action in which the removal is regulated by special statutes."

Section 2 of Act No. 133 of the year 1933 provides: "Removal is permitted, subject to the provisions of the act, in cases in which the removal is regulated by special statutes, and in accordance with the statute last mentioned."

The provision for an appeal from a judgment entered in a Forcible Entry and Detainer action is stated in Par. 19, Chap. 57, Cahill's Ill. Rev. St. 1933, as follows:

"If any party shall feel aggrieved by the verdict of the jury or decision of the court, upon any trial had under this act, such party may have an appeal, to be taken to the same courts, in the same manner and tried in the same way as appeals are taken and tried in other cases. Provided, the appeal is prayed and bond is filed within five (5) days from the rendition of the judgment, and no writ of restitution, shall be issued in any case until the expiration of said five (5) days."

The filing of an appeal bond is regulated by this provision. The prayer of an appeal and the filing of a bond must appear from the record to have been made within five days from the rendition of the judgment, during which time no writ of restitution shall be issued. This clearly indicates that the provision for an appeal and the filing of a bond in this class of cases is regulated by this Act, and is not provided for by the Civil Practice Act. The case of City of Breese v. Abel, 359 Ill. 579, is somewhat analagous, and the court in that opinion said:

"The general rule that a statute which is a complete revision of the whole subject matter is, in effect, a legislative declaration that whatever is embraced in the new statute shall prevail and that whatever is excluded is discarded, manifestly has no application here. The provisions for an appeal bond in local improvement proceedings is regulated by special statute and is clearly within the exception of the Civil Practice Act and Rule 2 of this court. In City of Greenville v. Miller, 239 Ill. 323, we held that writs of error to review special assessment proceedings were governed by the provisions of section 96 of the Local Improvement act and not by the Practice act."

What was said by the Supreme Court in that opinion is clearly applicable to a proceeding such as we have before us at this time. The motion of the plaintiff to dismiss defendant's appeal will therefore be denied.

The defendant contends that there was no proof of demand made upon the defendant for possession of the premises in question. Therefore, there was no lawful withholding of the premises by the

defendant at that time. The record does not disclose a demand for possession, and without such demand the plaintiff did not establish a right to possession. The statute of Forcible Entry and Detainer provides in Chap 57, Sec. 2 of Cahill's Ill. Rev. St. 1933, as follows:

"The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided:

First - When a forcible entry is made thereon.

Second - When a peaceable entry is made and the possession unlawfully withheld.

Third - When entry is made into vacant or unoccupied lands or tenements without right or title.

Fourth - When any lessee of the lands or tenements, or any person, holding under him, holds possession, without right, after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit, or otherwise."

The record indicates that the defendant was in peaceful possession, and had been for some time. His possession was not an unlawful one. Therefore, in order for possession of the defendant to become unlawful, a demand was necessary, Fitzgerald v. Quinn, 165 Ill. 354. The statute is plain. The first clause of Sec. 2 does not apply because the defendant did not make forcible entry; the second clause, because the defendant was in peaceful possession, and there is no evidence in the record that he unlawfully withheld possession of the premises from the plaintiff, and the third clause is not applicable because the land in question is not vacant or unoccupied. The fourth clause is the only one upon which this suit may be predicated, if at all, and in order to make defendant's possession unlawful, notice is necessary and such demand must be served in the manner provided for by Section 3 of the same Act. The record is not altogether clear just how he obtained possession, whether as a tenant or otherwise.

For the reasons stated, the judgment in this action is reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

detachment at that time. The record does not disclose a formal
possession, and without such formal possession the right to possession
is not to possession. The statute of forcible entry and detainer
provides in 190 37, Sec. 2 of Chapter III, that it is

follows:

"The person entitled to the possession of lands or
tenements may be restored thereto in the manner hereinafter
provided:

- First - when a forcible entry is made thereon.
- Second - when a forcible entry is made and the
possession unlawfully withheld.
- Third - when entry is made into vacant or unoccupied
lands or tenements without right or title.
- Fourth - when any lease of the lands or tenements,
or any part thereof, is made under him, or his assigns,
without right, after the expiration of the lease or
term, or by his own title, condition or term, or
by notice to quit, or otherwise."

The record indicates that the defendant was in possession

possession, and had been for some time. His possession was not an
adversity over. Therefore, in order for possession of the defendant
to become unlawful, a second was necessary, Winters v. Winters.

100 Ill. 354. The statute is plain. The first clause of law.

does not apply because the defendant did not make forcible entry; nor
second clause, because the defendant was in peaceable possession, and

there is no evidence in the record that he unlawfully withheld

possession of the premises from the plaintiff, nor the third clause

is not applicable because the land in question is not vacant or

unoccupied. The fourth clause is the only one upon which this case

may be predicated, if at all, and in order to make defendant's

possession unlawful, notice is necessary, and such demand must be

served in the manner provided for by Section 2 of the statute. The

record is not sufficient to show that such demand was made, and

as a tenant or otherwise.

For the reasons stated, the judgment in this case is

reversed and the cause remanded.

REVEREND J. J. WINTERS.

37762

JOHN WOODS AND MARY WOODS,

Appellants,

v.

RAY WORTH AND SAMUEL L. FREEDMAN,

Appellees.

4
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

281 I.A. 602¹

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiffs appeal from a decree entered in the Circuit Court of Cook County dismissing the plaintiff's bill for want of equity.

The plaintiffs filed a bill of complaint on February 19, 1930, in the nature of a bill for accounting against the defendants, seeking to have the defendants account for the value of certain promissory notes amounting to the sum of \$1300, which notes were secured by the defendants in a certain real estate transaction, being part of the consideration for the benefit of the plaintiffs in the transfer of their ownership of the property known as the Harrison Street property.

The defendants filed answers denying that the plaintiffs were entitled to the relief prayed for.

The question is one of fact, and the evidence introduced by the parties is substantially that the plaintiffs were owners of certain real estate known as 3538 W. Harrison St., Chicago, Illinois. The building thereon was occupied by the plaintiffs as a home, and in February or March, 1929, Barney Cruise and Anna Cruise, his wife, offered to purchase said real estate. The plaintiffs employed James D. Worth, who was engaged in the real estate business, and Samuel L. Freedman, an attorney, to prepare the necessary papers to transfer the title of the real estate involved.

The plaintiff Mary Wood called at the office of James D. Worth, and in his absence talked to Ray Worth regarding the proposed

JAMES W. WOODS AND ELLY WOODS,

Plaintiffs,

v.

RAY WORTH AND RAYMOND A. WORTHMAN,

Defendants.

281 I.A. 002

Opinion filed June 26, 1935

MR. JUSTICE WOODS delivered the opinion of the court.

The plaintiff's bill of complaint was filed in the

Circuit Court of Cook County, Illinois, on February 12,

1935, and is captioned as follows:

The plaintiff's bill of complaint was filed on February 12,

1935, in the name of a bill for recovery against the defendant,

asking to have the defendant's account for the value of certain

promissory notes amounting to the sum of \$100,000, which were sold

secured by the defendant in a certain real estate transaction, being

part of the consideration for the benefit of the plaintiff in the

transfer of their ownership of the property known as the Western

Trust Property.

The defendant's bill of complaint was filed on February 12,

1935, and is captioned as follows:

The question is one of fact, and the plaintiff's bill of

complaint is captioned as follows: The plaintiff's bill of

certain real estate known as 1000 N. Dearborn St., Chicago, Illinois,

the building thereon was sold to the plaintiff on 1/12/35, and

in February or March, 1935, money was paid and some notes, etc.,

issued to purchase said real estate. The plaintiff's bill of

complaint is captioned as follows: The plaintiff's bill of

complaint is captioned as follows: The plaintiff's bill of

transfer the title of the real estate involved.

The plaintiff's bill of complaint was filed in the Circuit Court of

Cook County, Illinois, on February 12, 1935, and is captioned as follows:

sale and told him regarding the transaction, and on the following day James D. Worth, since deceased, called to see the plaintiff, and thereafter the following transactions took place: An agreement of sale for the plaintiffs' real estate was entered into, on March 12, 1929, by Ray Worth, one of the defendants, as owner, for the sum of \$6800, the buyers being the Cruises, who were to take the property subject to the mortgage securing the payment of \$2500 then on the property, and the execution of notes, payable at the several maturities mentioned, to be secured by a second mortgage on this property, for the sum of \$2800 and \$1500 in cash. On March 25, 1929, there was endorsed on the back of this contract of sale signed by Ray Worth, the defendant, the direction to James D. Worth and wife to execute a warranty deed conveying the Woods property to Barney V. and Anna C. Cruise, his wife.

From the record it appears that about the same time there was an optional contract, dated March 13, 1929, for the purchase by Ray Worth of the property known as 3638 Flournoy Street, in Chicago, for the sum of \$9,750. In connection with the transfer of this property is a letter, dated March 14, 1929, signed by Ray Worth, with directions to the owners, Mathew Webber and Nellie Webber, to convey the real estate described in the option to John and Mary Woods, who were to execute the mortgage to secure the payment of certain notes thereon, which the Webbers agreed to accept.

In the execution of various papers required by these transactions, we find there is evidence that while James Worth was agent of the plaintiffs, he charged a commission of \$240 for which he was to receive a credit on a balance of \$900 due on a promissory note for monies loaned to him by the plaintiffs. While so acting as agent for the plaintiffs, it appears from the record that the contract of sale to Barney and Anna Cruise was executed by Ray Worth, and so, from the evidence, Ray Worth had knowledge that Barney and Anna Cruise were to

and told him regarding the transaction, and on the following day
James C. North, also deceased, called to see the plaintiff, and
thereafter the following transactions took place: An agreement of
sale for the plaintiff's real estate was entered into, on March 1,
1893, by the Norths, one of the defendants, as grantor, for the sum of
\$600, the buyers being the plaintiff, and were to take the property
subject to the mortgage securing the payment of \$200 loan on the
property, and the retention of home, subject to the general mortgage
mentioned, to be secured by a second mortgage on this property, for
the sum of \$400 and \$100 in cash. On March 15, 1893, there was
entered on the back of this contract of sale signed by the Norths,
the defendant, the direction to James C. North and wife to execute
a warranty deed conveying the whole property to James C. and wife
G. North, his wife.

From the record it appears that about the same time there was
an official contract, dated March 15, 1893, for the purchase by the
Norths of the property known as 2305 Broadway Street, in Chicago, for
the sum of \$2,750. In connection with the transfer of this property
is a letter, dated March 15, 1893, signed by the Norths, which is
to the effect, "After seeing the title abstract, to convey the real
estate described in the exhibit to John and Mary North, the sum of
\$2,750, the Norths to receive the sum of \$2,750 in cash, and to receive
the property to receive the sum of \$2,750 in cash, and to receive
which the Norths agreed to accept."

In the execution of various papers required by these trans-
actions, we find there is evidence that while James North was in
the plaintiff's, he obtained a commission of 1893 for which he was to
receive a credit on a balance of \$100 due him as proceeds were the
plaintiff's, and the plaintiff's. While so acting as agent, the
plaintiff, it appears from the record that the execution of sales
to James and Anne North was executed by the Norths, and so, from the
evidence, the Norths had knowledge that James and Anne North were in

execute notes for the principal sum of \$2800, these being in part payment of the purchase price which he had agreed to accept in the transaction. The consideration for the execution of the deed was \$6800. Thereafter follows the transaction regarding the Flournoy Street property. This property was purchased for \$9,750, and there is evidence that it was sold to the plaintiffs for \$11,750. The consideration for this transaction was part cash and the execution by the plaintiffs of a mortgage for \$3,750 and the notes secured thereby.

The record does not disclose clearly that the plaintiff John Woods, who could not read nor write, or Mary Woods, his wife, who had a limited education, had knowledge that their home was to be transferred for \$6800, or that the \$1300 received in notes from Barney and Anna Cruise as a part of the consideration, was to be retained by James or Ray Worth. Then again, the concealment of the purchase price from the plaintiffs for the purchase of the Flournoy street property and the sale of the Harrison street real estate, was unusual.

That James Worth as the agent of the plaintiffs took advantage of them is apparent. There is no evidence that tends to show that James Worth advised the plaintiffs he was purchasing the Harrison Street property, or that his brother Ray had any interest as a title holder in the property. When he, Ray Worth, signed the contract of sale for plaintiffs' property entered into with Barney and Anna Cruise, both James D. Worth and Ray Worth had knowledge of the terms thereof. The plaintiffs did not understand that they had given their consent to the delivery of the \$1300 notes, executed by the Cruises, to James Worth and delivered to him by Samuel L. Freedman, who was then acting as attorney for the plaintiffs.

Ray Worth was fully aware that he did not have title and could not convey the property in question. This is apparent from the direction on the back of the contract to his brother James Worth

to convey by warranty deed to the purchasers Barney and Anna Cruise. He knew that notes were to be executed, and these very notes provided for by the terms of the contract signed by him, Ray Worth, he received from his brother after they were executed as a part of the consideration by Barney and Anna Cruise.

This defendant cannot claim want of notice when he received the notes from his brother, as he claims, in payment of borrowed money which he loaned to him. Neither James Worth nor Ray Worth had any title to the Harrison Street property; the title to this real estate was in the plaintiffs. The plaintiffs, from the evidence in this record, talked to Barney and Anna Cruise about the sale of the Harrison Street property and retained James Worth as their agent to carry out the deal, and it is apparent that they were deceived, not alone by the manner of the transaction, but also by the retention of the \$1300 represented by the Barney and Anna Cruise notes, and for which Ray Worth must account.

Attorney Freedman in the delivery of the notes for \$1300 to James Worth did so without the consent of the plaintiffs, at least the written statement of the account by the attorney for the plaintiffs contains no deduction or account as to the disposition of the \$1300 notes involved in this litigation.

The record is not altogether clear upon the facts, and we are of the opinion, from the record, that this decree for the defendants should be reversed and the cause remanded for a new trial. Accordingly, the decree is reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

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the ...
for by the terms of the contract signed by him, ...
from his brother ...
action by ... and ...

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Harrison Street property and ...
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Attorney ...
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The ...
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WITNESSED AND ...

WILSON AND ...

37783

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in Error,

v.

ROBERT W. HARRISON,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

281 I.A. 602²

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error by the plaintiff to review the judgment entered in the Municipal Court of Chicago, finding defendant guilty of the crime of larceny. The defendant not appearing in this court we did not have the advantage of his theory of the case. From the common law record it appears that the defendant in the criminal proceeding was charged in an information filed in the Municipal Court of Chicago with the offense of larceny; that on October 12, 1933, in the City of Chicago, he did steal and carry away \$14.00 lawful money of the United States, property of the Prudential Life Insurance Company of America, a corporation. Defendant was tried on December 6, 1933, before the court without a jury, upon a plea of guilty. He was warned by the court of the consequences of his plea, and persisting, the court examined witnesses, the defendant at the time being represented by an attorney. The court found that the defendant had committed the crime of larceny of property, as charged in the information, and fixed his punishment at imprisonment for a period of six months in the House of Correction and to a fine of \$1 and costs. Thereupon, defendant was imprisoned, as provided for by said judgment.

On March 2, 1934, the State's Attorney of Cook County was served with notice of a motion to be made by the defendant and a petition in support of the motion, which motion was in the nature of a coram nobis proceeding provided for under Sec. 89 of the Practice Act, Ch. 110, Smith-Hurd's Ill. Rev. St. and Sec. 72 of the Civil

RECEIVED AT THE OFFICE OF THE SECRETARY OF THE ARMY
WASHINGTON, D. C. 20315

3

• КОЛЛЕКЦИЯ •

Letter to the Editor

505 .A.1 I 85

Opinion filed June 26, 1935

to the fact that the same person is not always the same person.

Attachment to review the judgment entered in the summary judgment

...the ... of the ...

to you may find the bill of exchange of interest for the first time

of his theory of the case. From the opinion for report it appears

that the defendant in the original proceeding was not found in an

Information filed in the medical case of [redacted] and [redacted]

of January; that he returned to the city of Chicago, Ill.

and only way to do this is to have the United States

of the Plaintiff's Insurance Company of New York

Reference is made to the fact that the above information was obtained from the files of the Department of the Army, and that the same information was also obtained from the files of the Department of the Navy.

any, and a good deal of writing to be done, and

CONFIDENTIAL - SECURITY INFORMATION

5. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

Correct found in the German text and corrected the original copy.

TO: [redacted] FROM: [redacted]

Comparison for a series of six weeks in the case of

Page 10 of 10

THE UNIVERSITY OF CHICAGO

On March 1, 1954, the State Attorney at New Orleans

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[illegible]

Practice Act.

The petition in this case omitting the formal allegation, alleged:

"Your petitioner, Robert Harrison, further shows that at the time of trial in this case there was evidence which could not be produced, but which can now be presented to the court, which would prove to the court that defendant is innocent of the charge as made and is entitled to a new trial at the court's earliest convenience so that said evidence can be presented to the court and a motion made for a new trial."

The petition filed by the defendant was under oath. The trial court would not have jurisdiction of the person of the defendant after he was imprisoned in the House of Correction to satisfy the judgment, unless a proceeding was instituted as provided for under the statute in the nature of a writ of coram nobis to bring the defendant before the court, and it must appear from the petition that facts not appearing of record, which if known to the court at the time the judgment was entered, would have prevented its rendition.

The petition does not state facts which would justify the court in setting aside the judgment of conviction. The pleader's conclusion is not an aid in determining from the petition itself the errors of fact relied upon by the petitioner. The purpose of the motion and the ground upon which the trial court may proceed are stated in the case of Jacobson v. Ashkinaze, 337 Ill. 141, as follows:

"The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustration of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleading or to correct errors of the court upon questions of law."

10150 31

The petition in this case soliciting the federal government,

: 55 :

[illegible]

The petition filed by the defendant was under oath. The trial court could not have jurisdiction of the person of the defendant after he was imprisoned in the House of Correction to satisfy the judgment, unless a proceeding was instituted or provided for under the statute in the nature of a writ of habeas corpus to bring the defendant before the court, and it was shown from the record that there was no proceeding of record, which it seems to the court at the time the judgment was entered, would have prevented the execution.

The petition does not state facts which would justify the court in setting aside the judgment of conviction. The petitioner's contention is not an independent determination from the conviction itself. The errors at trial relied upon by the petitioner. The grounds of the motion and the reasons why the trial court was incorrect are stated in the case of Lopez v. United States, 370 U.S. 466, 82 S.Ct. 1191, 18 L.Ed.2d 1047.

The purpose of this document is to provide information to the Attorney General regarding the activities of the Communist Party, U.S.A., and its efforts to influence the government and the public. The document is divided into two main sections: a summary of the activities of the Communist Party and a list of the names of the individuals who are known to be active in the Communist Party.

It is apparent from the petition filed under oath that the defendant did not bring himself within the requirements of the rule of law laid down by the Supreme Court in matters such as we have before us in this case. No facts are alleged, no statement is made from which the court could determine whether or not the court was justified in setting aside the judgment of conviction.

The defendant having failed to comply with the rule as announced by the Supreme Court and above quoted, it will be necessary for this court to reverse the judgment heretofore entered by the trial court releasing the defendant and discharging him from imprisonment in the House of Correction.

JUDGMENT REVERSED.

WILSON AND HALL, JJ. CONCUR.

It is apparent from the evidence that the defendant did not bring himself within the requirements of the rule of law laid down by the House of Lords in *Wainwright v. Mather* and as such has not obtained in this case. The House has decided, in *Wainwright v. Mather*, that it is not true which the court could determine by itself or not the court was justified in making orders for judgment of conviction. The defendant having failed to comply with the rule as announced by the House of Lords and as such, it will be necessary for this court to reverse the judgment previously entered by the trial court regarding the defendant and discharge him from imprisonment in the House of Correction.

JUDGMENT REVERSED.

KLING AND BELL, JJ. CONCUR.

37790

GERTRUDE FAVORS,

(Plaintiff) Appellee,

v.

CALEDONIAN INSURANCE COMPANY,
a Corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

281 I.A. 602³

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment of \$500 for the plaintiff, entered in the Municipal Court of Chicago in an action upon an insurance policy issued by the defendant, wherein claim is made for the loss of an automobile owned by the plaintiff, alleged to have been stolen. The cause was tried before the court without a jury and at the conclusion of the evidence the court entered the judgment appealed from.

The evidence before the court is, in substance, that the automobile in question was taken from the garage in the rear of the home of the plaintiff, located at 4848 Langley Avenue, in Chicago, in the night-time, on July 21 or 22, 1933; that the plaintiff informed the solicitor for the defendant, from whom she purchased the policy of insurance, of her loss. Thereafter, on July 24, 1933, C. H. Potts, a representative of C. G. Eberth & Co., insurance adjusters, visited the plaintiff regarding the loss. Potts made an examination of the garage, questioned the plaintiff, and took down in writing the facts of her loss on a printed form entitled, "Assured's Report of Automobile Theft loss or Damage", which she signed. The plaintiff made a further report of the loss to the defendant by letter a week later. This letter was not sworn to. Thereafter the plaintiff met Potts twice at the office of C. G. Eberth & Co. accompanied by her attorney. On the occasions when she called at the adjuster's office she signed what are termed non-waiver agreements. From these agreements it appears

DEFENDANT, (Plaintiff) Applied,
v.
CAROLINA INSURANCE COMPANY,
a Corporation,
(Defendant) Respondent.

DEPARTMENT OF THE DISTRICT COURT

OF THE DISTRICT OF COLUMBIA

281 I.A. 603

Opinion filed June 28, 1935

MR. JUSTICE JAMES EARL WATSON, JR. writes for the court.
This is an appeal by the defendant from a judgment by
the court for the plaintiff, entered in the District Court of Columbia
in an action upon an insurance policy issued by the defendant,
wherein claim is made for the loss of an automobile owned by the
plaintiff, which is alleged to have been stolen. The issue was tried before
the court without a jury and at the conclusion of the evidence the
court entered the judgment recited above.
The evidence before the court is, in substance, that the
automobile in question was taken from the garage in the rear of the
house of the plaintiff, located at 4415 Lanham Avenue, N.W., Washington,
in the night-time, on July 21 or 22, 1933; that the plaintiff informed
the police for the defendant, from whom was procured the policy
of insurance, of her loss. Thereafter, on July 22, 1933, J. E. Foster,
a representative of J. E. Foster & Co., Insurance Adjusters, advised
the plaintiff regarding the loss. Foster was in possession of the
policy, questioned the plaintiff, and took down in writing the facts
of her loss on a printed form entitled, "Plaintiff's Report of Automobile
Theft Loss or Damage", which was signed. The plaintiff made a written
report of the loss to the defendant by letter a week later. This
letter was not sworn to. Thereafter the plaintiff and Foster were
at the office of J. E. Foster & Co., Insurance Adjusters, on
the occasions when she called at the adjuster's office and signed what
are termed non-sworn statements. From these statements it appears

that C. G. Eberth & Co. and C. H. Potts acted as adjusters for the defendant insurance company.

The defendant contends that the trial court erred in permitting the plaintiff to file two different amended statements of claim after the evidence had been heard by the court. While it is true that the pleadings of the parties should be at issue at the time the cause is reached for trial, still it is largely within the discretion of the trial court to permit either party to file an amended pleading, and unless the party complaining was prejudiced by the Court's action, this court will not consider such action erroneous, but entirely within the discretion of the trial court.

The principal contention of the defendant is that the plaintiff did not comply with the terms of the policy as to proof of loss, nor set out facts from the record sufficient to waive performance of this requirement of the policy. The two so-called non-waiver agreements dated October 31, 1933, and November 29, 1933, which were signed by the plaintiff and C. G. Eberth and C. H. Potts, adjusters, were offered in evidence by the defendant, and it is clear that C. G. Eberth & Company was selected by the defendant to investigate and adjust the amount of the loss or damage. The defendant had knowledge of the loss of plaintiff's automobile, not alone from these exhibits, but from the report of Potts, who acted in the matter for the defendant.

While it is true that the plaintiff must perform according to the terms of the policy, still when we consider the fact that the defendant sought to adjust the claim, and later withdrew the offer, the defendant cannot at this time take advantage of this position and contend that it cancelled the policy for the reason that the plaintiff did not file a written proof of loss.

It is apparent from all the facts in the record that the

that U. S. Smith & Co. and C. A. Foster acted as defendants for the

defendant insurance company.

The defendant contends that the trial court erred in

granting the plaintiff the two different amended pleadings of

claim after the evidence had been heard by the court. That it is

true that the plaintiff of the parties should be at liberty to amend

the cause as amended for trial, still it is largely within the

discretion of the trial court to permit either party to file an

amended pleading, and unless the party complaining was prejudiced by

the court's action, this court will not consider such action

erroneous, but entirely within the discretion of the trial court.

The principal contention of the defendant is that the

plaintiff did not comply with the terms of the policy as to payment of

loss, nor set out facts from the record sufficient to show recovery

under the terms of the policy. The two amended non-

revenue agreements dated October 11, 1883, and November 22, 1883,

which were signed by the plaintiff and C. A. Foster and U. S. Smith,

defendants, were offered in evidence by the defendant, and it is urged

that U. S. Smith & Company was released by the defendant to receive

the amount of the loss of the vessel. The defendant also

introduced evidence of the loss of the vessel, and also from these

exhibits, but from the report of the jury, who acted in the matter for

the defendant.

While it is true that the plaintiff must perform conditions

to the terms of the policy, still there are certain facts that show the

defendant sought to adjust the claim, and later withdrew the claim,

and defendant cannot at this time recover the amount of the loss and

conceded that it cancelled the policy for the reason that the plaintiff

did not file a written report of loss.

It is contended that all the facts in the record show that

defendant waived this requirement of the policy by reason of misleading the plaintiff by offer of payment, and in this offer of payment, the authority of Potts, who called at the plaintiff's home as agent, is established by the non-waiver agreements, in which the firm of C. G. Eberth & Co. was appointed to make payment and to act by and through Potts as defendant's agent.

The question of waiver is largely one of fact, and it is for the court to determine from all the evidence whether or not the record is sufficient to establish a waiver. The law is well settled upon this point, and we need cite no authorities.

The defendant contends that the court erred in admitting the testimony of Potts under Sec. 33 of the Municipal Court Act, upon the ground that he was not a party to the suit, nor a director, an officer, or managing agent of the defendant corporation.

From an examination of the testimony of Potts it appears that while the examination of this witness was not justified, according to the provisions of Sec. 33 of the Municipal Court Act, the testimony was not so prejudicial as to warrant a reversal upon this ground. The evidence of Potts does not tend to establish any fact other than is already in the record, and therefore is not erroneous. O'Connor v. Maryland Motor Ins. Co., 287 Ill. 204, at p. 212. The defendant cites Kaestner v. Pope, 152 Ill. App. 22, in support of its contention that the examination of Potts in the instant case was not proper. What the court said in that opinion has a material bearing upon the question in this case. The court there said:

"Section 33 of the Municipal Court Act only provides that a party in interest and certain officers and the managing agent of a corporation may be examined by the adverse party. Hodgkins was neither a party in interest nor the agent of a corporation, and cannot therefore be held to have been called under the statute, but must be held to be a witness called by the plaintiff. While plaintiff might not therefore impeach Hodgkins, it might contradict him by other evidence."

defendant raised this question of the policy to require of him
leading the plaintiff by way of payment, and in this case of
payment, the testimony of both, who called at the plaintiff's home
as agent, is corroborated by the non-receipt of payment, in which the
firm of J. B. Smith & Co. was mentioned to have received and to not
be and through letters of defendant's agent.

The question of which is likely one of fact, and it
is for the court to determine from all the evidence whether or not
the record is sufficient to establish a contract. The law is well
settled upon this point, and we need not cite authorities.

The defendant contends that the court erred in admitting
the testimony of both under No. 38 of the Evidence Code, and
the ground that it was not a party to the suit, nor a disinterested
evidence, or testimony of the defendant's agent.

From an examination of the testimony of both it appears
that while the testimony of both witnesses was not justified,
according to the provisions of No. 38 of the Evidence Code, but
the testimony was not so prejudicial as to require a reversal upon
this ground. The evidence of both does not tend to establish any
fact that there is already in the record, and therefore is not
prejudicial. Johnson v. Johnson, 137 Ill. 2d, 107.

p. 212. The defendant also contends that the testimony of both is the latest
support of its contention that the testimony of both is the latest
and not correct. And the court will in that opinion have a

material bearing upon the question in this case. The court will hold:
"Section 38 of the Evidence Code is not only a provision that
a party in interest and not a witness and the testimony
of a witness may be excluded by the adverse party
unless he offers a party in interest and the court is
satisfied, and cannot otherwise be held in such case
which under the statute, but must be held to be a witness
called by the plaintiff. While the plaintiff is not to be
between both, it might contradict and by other witnesses."

It is to be noted from what this court said upon the facts in that case that Hodgkins could not be held to have been called under the statute, but must be held to have been a witness called by the plaintiff, and that would mean that the witness was subject to cross-examination by the defendant, if desired.

Other questions have been called to our attention, but from what we have stated in this opinion there was no error such as would justify this court in reversing the judgment. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

It is to be noted that this court will upon the
 facts in this case that nothing could be said as to the
 called under the statute, but must be held to have been a witness
 called by the plaintiff, and that would mean that the witness was
 subject to cross-examination by the defendant, if desired.
 Great questions have been called to our attention, but
 from what we have stated in this opinion there was no error even
 as would justify this court in reversing the judgment. The judgment
 is accordingly affirmed.

FOR THE PLAINTIFF.

WILSON AND HALL, ATTORNEYS.

37798

JOE PERLMAN,

Plaintiff in Error,

v.

SAM SAMSON,

Defendant in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

281 I.A. 602⁴

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error by the plaintiff to review the judgment entered in the Municipal Court of Chicago upon a verdict of the jury in favor of the defendant in an action by the plaintiff to recover from the defendant \$867, the amount evidenced by several checks which it is alleged the plaintiff cashed for the defendant.

Plaintiff's second amended statement of claim alleges, in substance, that on the 10th day of November, 1930, seven of the checks for the sum of \$100 and four of the checks for the sum of \$25, each drawn on the Liberty Trust and Savings Bank, were delivered to the plaintiff by the defendant; that the checks when presented to the bank on their respective dates for payment were returned by the bank unpaid, with the endorsement thereon "Not sufficient funds;" that the defendant obtained the \$800 from the plaintiff upon the representations that the checks would be paid when presented to the bank, which representations when made were false, of which the defendant well knew.

The defendant makes a general denial of fraud in his affidavit of merits; also that in cashing the checks, the total amount of which was \$8,083, the defendant received \$7,000 in cash, the difference of \$1,083 representing usury, and the plaintiff's suit is barred and in violation of the Usury Act of the Statutes of the State of Illinois.

THE COURT,

finds in error,

v.

THE COURT,

finds in error.

281 A. 802

Opinion filed June 26, 1935

MR. JUSTICE KENNEDY delivered the opinion of the court.

This case is in this court upon a writ of error by the plaintiff to review the judgment entered in the Circuit Court of Chicago upon a verdict of the jury in favor of the defendant in an action by the plaintiff to recover from the defendant \$25,000 amount evidenced by several checks which it is alleged the plaintiff cashed for the defendant.

The plaintiff's second amended statement of claim alleges,

in substance, that on the 10th day of November, 1930, seven of the checks for the sum of \$100 and four of the checks for the sum of \$25, each drawn on the Liberty Trust and Savings Bank, were delivered to the plaintiff by the defendant; that the checks were presented to the bank on their respective dates for payment were returned by the bank unpaid, with the endorsement thereon "not sufficient funds"; that the defendant obtained the \$200 from the plaintiff upon the representation that the checks would be paid when presented to the bank, which representation was made true, of which the defendant well knew.

The defendant makes a general denial of things in the affidavit of service; also that in making the checks, the total amount of which was \$2,085, the defendant received \$7,000 in cash, the difference of \$1,000 representing usury, and the plaintiff's suit is barred and in violation of the laws of the State of Illinois.

The case was tried before a jury and a verdict was returned finding the defendant not guilty, and the court entered judgment for the defendant after denying plaintiff's motion for a new trial and in arrest of judgment.

Two questions are raised by the plaintiff. The first is that the verdict and judgment is against the manifest weight of the evidence. From the certificate of the trial court to the proceedings, we are limited in our consideration to but one error that the plaintiff raised, and that is: Was the plaintiff denied a fair trial so that the verdict of the jury was the result of the improper argument of the attorney?

The certificate of the trial court attached to the statement of the proceedings certifies that the bill of exceptions contains the argument had at the trial and the questions of law urged by the plaintiff, but does not certify that the bill of exceptions contains all of the evidence had on the trial, and for that reason the question of the weight of evidence urged by the plaintiff is not properly before this court.

As to the remaining question of improper argument of defendant's attorney, it is usual for the court to examine the argument of plaintiff's attorney in order to determine whether the reply of the defendant's attorney was warranted by what was said by plaintiff's attorney. The abstract does not contain this argument, but the court is referred to the record for such examination. It is always good practice to abstract the record, so that such parts complained of are before the court. In order to properly consider the arguments offered by both sides, the plaintiff's argument should have been abstracted, for this court will not search the record for reasons which counsel may suggest to reverse the judgment.

The court was tried before a jury and a verdict was returned finding the defendant not guilty, and the court entered judgment for the defendant after denying plaintiff's motion for a new trial and in arrest of judgment.

Two questions are raised by the plaintiff. The first is that the verdict and judgment are against the weight of the evidence. From the certificate of the trial court to the necessary effect that the evidence is not and error is not shown, we are limited in our examination to set out error and the plaintiff itself, and that is: was the district judge's verdict so that the verdict of the jury was the result of the improper argument of the attorney?

The certificate of the trial court attached to the statement of the proceedings certifies that the bill of exceptions contains the argument had at the trial and the questions of law asked by the plaintiff, and does not certify that the bill of exceptions contains all of the evidence had on the trial, and for that reason the question of the right of evidence urged by the plaintiff is not properly before this court.

As to the remaining question of improper argument of defendant's attorney, it is usual for the court to examine the statement of plaintiff's attorney in order to determine whether the reply of the defendant's attorney was warranted by what was said by plaintiff's attorney. The statement does not contain this argument, and for that reason is not the record for such examination. It is always the practice to abstract the record, so that each party has a copy of the record before the court. In order to properly consider the arguments offered in each case, the plaintiff's attorney should have been abstracted, for this would still not remove the record for review which counsel may suggest to review the judgment.

We have examined the abstract furnished, and find that the trial court sustained objections offered by the plaintiff to certain portions of defendant's argument. The remarks are somewhat caustic, and while we are unable to reach the conclusion that the remarks were erroneous and had a prejudicial effect upon the minds of the jury, the question of prejudicial effect would depend largely upon whether the jury was swayed by passion and prejudice, rather than by the evidence, and as we have indicated, the evidence not being before us, we are not in a position to pass judgment.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

we have examined the various theories, and this has

trial court sustained objection to the admission of
 certain portions of defendant's statement. The court has
 admitted, and while we are unable to reach the conclusion that the
 remarks were erroneous and had a prejudicial effect upon the rights
 of the jury, the question of prejudicial effect would depend largely
 upon whether the jury was misled by emotion and prejudice, rather
 than by the evidence, and as we have indicated, the evidence not
 being before us, we are not in a position to pass judgment.
 For the reasons stated, the judgment is affirmed.
 JUDGE

SINCE TWO HALL, 11. 1900.

37811

CHARLES G. STEVENS,
(Plaintiff) Appellee,

v.

S. R. FRALICK & CO., a corporation,
(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

281 I.A. 602⁵

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment of \$1066 entered for the plaintiff by the court upon a hearing, a jury having been waived. This action is one upon a lease, and was brought by the plaintiff for rents due from May 1st, to August 31, 1933, inclusive, in the sum of \$1,000, and for sprinkler and valve alarm service for the period commencing May 1, 1933, and ending April 30, 1934, in the sum of \$66.

The written lease provides for the payment of rent, bears date of February 18, 1930, and is a demise of the third floor of the Stevens Annex Building, located at 560-562 West Monroe Street, Chicago, Illinois. The lease as originally drafted by the plaintiff was for a period of three years from May 1, 1930 to April 30, 1933, and was submitted to S. R. Fralick, as president of defendant company, who signed and sealed the lease, and it was turned over to one S. M. Ellman, an employee of defendant company, to be delivered to the plaintiff. Mr. Ellman had been instructed by Mr. Fralick to secure an additional two-year option, and he conferred with the plaintiff for such option, which plaintiff refused to grant, but offered to extend the lease for a period of two years upon the same terms as contained in the original lease. After several conferences between the plaintiff and Ellman as the defendant's representative, a rider was drafted by the plaintiff and attached to the lease, which lease as well as the rider was signed by the plaintiff on or about

CHARLES C. BRYANT,

(Plaintiff),

v.

U. S. TRAILER & CO., a corporation,

(Defendant).

CHARGE OF

CHARGE OF

CHARGE OF

281 A. 602

Opinion filed June 26, 1935

THE COURT, after having read the petition of the plaintiff, and after having heard the testimony of the parties, and after having considered the evidence, finds that the plaintiff is entitled to recover the sum of \$1,000, and for attorney and witness fees for the period commencing May 1, 1931, and ending April 30, 1932, in the sum of \$100.

The written lease provided for the payment of rent, bears date of February 18, 1930, and is a lease of the third floor of the Stevens Annex Building, located at 350-352 East Monroe Street, Chicago, Illinois. The lease was originally entered by the plaintiff for a period of three years from May 1, 1930 to April 30, 1933, and was assigned to E. W. Taylor, Jr. President of defendant company, who signed and sealed the lease, and it was turned over to the plaintiff. Mr. Taylor was instructed by the plaintiff to secure an additional two-year extension, and he conferred with the plaintiff for such action, which plaintiff refused to grant, but offered to extend the lease for a period of two years upon the same terms as contained in the original lease. After several communications between the plaintiff and Taylor as the defendant's representative, a check was drawn by the plaintiff and assigned to the lease, which lease as well as the check was signed by the plaintiff on or about

March 15, 1930. The lease with the attached rider was then delivered to Ellman for the defendant Company. Defendant on or about April 9, 1930, took possession of the premises, and on or about April 30, 1933, vacated the premises, after an occupancy of a three-year period.

The defendant up until that time paid the rent provided for in the lease, except the rent provided for the extended time. The rider attached to the lease is the subject of this controversy, which concerns the liability of the defendant for the rent payable for the extended period, and is as follows:

"The lease to which this rider is attached, between Charles G. Stevens and S. R. Fralick & CO., is hereby extended for a term of two (2) years from its stated expiration, April 30th, 1933, to a final termination on April 30th, 1935, and the consideration is hereby increased from Nine Thousand (\$9,000.00) Dollars to Fifteen Thousand (\$15,000.00) Dollars, said extension being at the same monthly rate as the original three (3) years."

The defendant contends that the liability of the defendant is fixed by what is termed the original lease signed by the president of the defendant Company. No rider was then attached, nor was any officer of the defendant company authorized to negotiate for a term of five years for the premises in question. The evidence does disclose that S. M. Ellman, an agent for the defendant, acted upon the instructions of Mr. Fralick, president of the defendant company, to negotiate with the plaintiff for an option of a two-year extension of the term from April 30, 1933.

The authority of Ellman to act for the defendant company is one of the controversial facts in this case, and the question of the liability of the defendant under the terms of the rider is raised, as the rider is not signed by the defendant, either as a part of the original lease or separately, and it is contended that the plaintiff cannot recover upon the instrument as it appears in the record. It is not disputed that in the negotiations for an extension of the term of the lease, Ellman acted under the direction of Fralick, president

March 12, 1930. The lease with the attached rider was then delivered to William for the Defendant Company. Defendant on or about April 5, 1930, took possession of the premises, and on or about April 20, 1930, vacated the premises, after an occupancy of a three-year period. The defendant on April 12, 1930, the rent provided for in the lease, except the rent provided for the extended time. The rider attached to the lease is the subject of this controversy, which concerns the liability of the defendant for the rent payable for the extended period, and is as follows:

"The lease to which this rider is attached, between Charles O. Stevens and J. M. Francis & Co., is hereby extended for a term of two (2) years from the date of expiration, April 20th, 1930, to a final termination on April 20th, 1932, and the consideration is hereby increased from nine thousand (\$9,000.00) dollars to fifteen thousand (\$15,000.00) dollars, and extended until the same monthly rate as the original lease (\$1,250.00) per month."

The defendant contends that the liability of the defendant is fixed by what is termed the original lease signed by the president of the defendant company. No rider was then attached, nor was any officer of the defendant company authorized to negotiate for a term of five years for the premises in question. The evidence does disclose that E. M. Francis, an agent for the defendant, acted upon the instructions of J. M. Francis, president of the defendant company, to negotiate with the plaintiff for an extension of a two-year extension of the term from April 20, 1932.

The authority of Francis is not for the defendant company is one of the controversial issues in this case, and the question of the liability of the defendant under the terms of the rider is fixed as the rider is not signed by the defendant, either as a part of the original lease or separately, and it is contended that the plaintiff cannot recover upon the instrument as it appears in the record. It is not disputed that in the negotiations for an extension of the term of the lease, Francis acted under the direction of J. M. Francis, president

of the defendant Company. Mr. Fralick was not located in Chicago. After Ellman received the original lease signed by the defendant, and during the negotiations for the extended period, Ellman corresponded and received from Fralick, president of the defendant company, replies and telegrams with instructions in the matter. When the plaintiff refused to grant an option to the defendant for the extended period, it of necessity required further negotiations, and finally, from Ellman's evidence, it appears that the defendant could not acquire an option from the plaintiff for the two-year period, and so a lease for the term of five years was negotiated. Then for the first time was the original lease produced and signed by the plaintiff as extended, and with the rider attached delivered to Ellman for the defendant. This lease was examined by the president within fifteen days after possession was taken, and then for the first time he voiced his objection to the lease as extended for the two-year period.

The facts establish the authority of the defendant's agent to act for it, and the question being one of fact, was properly considered by the court. It is a fact that the rider was not signed by the defendant by its president. The fact, however, that possession of the premises was taken by the defendant and the defendant continued to remain in possession until the three year period had expired, does not of itself justify the refusal to pay the accruing rent provided for by the lease. The defendant knew of the condition and accepted the benefit of possession, and it cannot upon any theory deny liability. There is always a time to assert a right. There is always a time when a person must assert or voice objections, but it has never been the law that a part acceptance of the benefit received by a party under the terms of a contract will not justify his refusal to a full performance provided for by the instrument. In this case the defendant, while he did not sign the extension agreement, had

of the defendant company. Mr. Patrick was not located in Chicago.
After William received the original lease signed by the defendant,
and during the negotiations for the extended period, William
corresponded and received from Patrick, president of the defendant
company, replies and telegrams and instructions in the matter. When
the plaintiff refused to grant an option to the defendant for the
extended period, it is necessarily required further negotiations, and
finally, from William's evidence, it appears that the defendant could
not obtain an option from the plaintiff for the two-year period,
and so a lease for the term of five years was negotiated. Then
for the first time was the original lease produced and signed by
the plaintiff as extended, and with the rider attached delivered
to William for the defendant. This lease was examined by the presi-
dent within fifteen days after possession was taken, and then for
the first time he voiced his objection to the lease as extended
for the two-year period.

The facts establish the authority of the defendant's agent
to act for it, and the question being one of fact, was properly
submitted by the court. It is a fact that the rider was not signed
by the defendant or its president. The fact, however, that possession
of the premises was taken by the defendant and the defendant contin-
ued to remain in possession until the three year period had expired,
does not establish liability and cannot be a basis for the recovery
provided for by the lease. The defendant knew of the condition and
accepted the benefit of possession, and it cannot claim that liability
any liability. There is always a time to assert a right. There is
always a time when a person must assert or voice objection, but it
has never been the law that a party must assert the benefit provided
by a party under the same as a contract will not, liability can be
to a full performance provided for by the instrument. In this case
the defendant, while he did not sign the extending agreement, had

knowledge of it, and the acceptance of the benefit under the terms of the lease is as binding as if the signature of the president appeared upon the document.

The accepted rule that performance of a contract, although not signed, is binding, appears in the following cases: McFarlane v. Williams, 107 Ill. 33, 43; Sinclair v. Sinclair, 224 Ill. App. 130; Dupuis v. Kipnis, 217 Ill. App. 254; Milligan v. E. R. Darlington Lumber Co., 145 Ill. App. 518; Henderson v. Virden Coal Co., 78 Ill. App. 437; Baragiano v. Villani, 117 Ill. App. 372.

The defendant claims error in the refusal of the court to admit in evidence two leases drafted by the plaintiff for a full term of five years for the premises in question and presented to the defendant for execution. These drafted leases were presented to the defendant after possession was taken, which the defendant refused to sign. The unsigned leases were immaterial and did not tend to prove any fact. If, from the facts in evidence, the defendant is liable, then its refusal to sign the prepared leases is not a defense to this action any more than if a creditor for moneys loaned presented a promissory note to a debtor for execution, which he refused to execute. The debtor is liable for the money due the creditor, notwithstanding his refusal to sign the promissory note.

It is also contended that certain letters which passed between the president of the defendant company and Ellman should have been received in evidence by the court to show the intent of the parties. It seems self-evident that what was said by the president in a letter to an employee or the employee's reply thereto, would not bind the plaintiff, unless the plaintiff had knowledge of the contents, or the contents was brought to his attention.

From the record, the proceeding does not present error which would justify a reversal, and from consideration of the record as presented, the court is of the opinion that the judgment should be affirmed, and it is accordingly so ordered.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

That the report, the preceding facts and circumstances which would justify a reversal, and from consideration of the record as presented, the court is of the opinion that the judgment should be affirmed, and it is accordingly so ordered.

RECORDED & INDEXED.

WILSON AND HILL, CL. CLERKS.

37820

FRANCIS H. BONNER,

Plaintiff-Appellee,

v.

HUBERT ELLIS, et al.,

On Appeal of N. C. ELLIS,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

281 I.A. 603¹

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant N. C. Ellis from a judgment in the sum of \$12,350, entered in the Municipal Court of Chicago upon the verdict of a jury. The action is based upon a promissory note dated June 3, 1930, for \$10,000, payable to the order of Bonner Brooks & Co. ninety days after its date and bearing interest at the rate of 6% per annum, payable in New York, signed by General Laundry Machinery Corp. by Hubert Ellis, Vice President and I. F. Willey, President. There appears on the note the indorsement of Hubert Ellis, N. C. Ellis, Bonner Brooks & Co., Bonner, Brooks & Co., Inc., by F. A. Bonner, President. The cause was submitted to a jury and a verdict was rendered against the two defendants in court, namely, Hubert Ellis and N. C. Ellis in the sum of \$12,350.00.

The trial court, upon a motion for a new trial, which was allowed as to the defendant Hubert Ellis and overruled as to defendant N. C. Ellis, entered judgment on the verdict of the jury against the defendant N. C. Ellis.

The defendant contends that the failure of the plaintiff to give the defendants notice, as indorsers of the note in question, of non-payment and that the plaintiff looked to the defendants for payment, discharges the defendants as indorsers.

The Uniform Negotiable Instruments Act adopted by both the State of New York and the State of Illinois, and which contains

281 I.A. 603

Opinion filed June 26, 1935

... the defendant's position ...
This is an appeal by the defendant ...
judgment in the sum of \$1,350, entered in the Municipal Court of
Chicago upon the verdict of a jury. The action is based upon a
promissory note dated June 2, 1930, for \$10,000, payable to the
order of Banner Brocks & Co. ninety days after its date and bearing
interest at the rate of 6% per annum, payable in New York, at bank
by General Laundry Machinery Corp. by Robert Ellis, Vice President
and J. L. Willey, President. There appears on the note the indorse-
ment of Robert Ellis, J. L. Willey, Banner Brocks & Co., Company,
Brocks & Co., Inc., by J. A. Bonner, President. The cause was sub-
mitted to a jury and a verdict was rendered against the two defend-
ants in court, namely, Robert Ellis and J. L. Willey in the sum of
\$1,350.00.
The trial court, upon a motion for a new trial, which was
allowed as to the defendant Robert Ellis and overruled as to the other
and J. L. Willey, entered judgment on the verdict of the jury against
the defendant J. L. Willey.
The defendant contends that the failure of the plaintiff
to give the defendant notice, as required by the act in question,
of non-payment and that the plaintiff looked to the defendant for
payment, which negates the defendant's contention.
The United States Supreme Court has held in cases of note
the state of New York and the State of Illinois, and which contains

17350
THOMAS A. HUNTER,
Plaintiff-Appellee,
v.
ROBERT ELLIS, et al.,
On appeal of J. L. WILLEY,
Defendant-Appellant.

a provision applicable to the instant case, is as follows:

"Waiver of notice. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied."

The question raised upon appeal, notice of dishonor and waiver thereof, is largely one of fact. The execution, as well as the indorsement of the note, is not of itself disputed. It appears from the facts in evidence, however, that the subject of maturity of the note was first referred to in a letter dated August 15, 1930, by the enclosure of a renewal note signed by the defendant Norman Ellis, as President of the General Laundry Machinery Corporation, which letter was signed by John Hoermann, who was in the employment of the General Laundry Machinery Corporation as Credit Manager, and in charge of the collections and the discounting of customer's paper and approving credits. He worked with W. B. Ellis, who was secretary and treasurer of this Company. The receipt of this letter by the plaintiff was followed by a letter in reply dated September 2, 1930, in which the renewal note was returned, as well as a check for \$100 for accrued interest, to the corporation, and in which it was stated that the note would mature September 3, 1930, and bore the indorsement of N. C. Ellis and Mr. Hubert Ellis.

The plaintiff testified to a conversation had with the defendant Hubert Ellis in July or August, 1930, regarding the extension of the note in question, and that the plaintiff agreed to extend the note ninety days, provided it bore the defendants' indorsement, and that he also talked with N. C. Ellis regarding the execution of the extension note, who thanked him for the extension agreement made with Hubert Ellis.

The plaintiff also testified that during the course of the negotiations he sent a letter to Norman Ellis, which states, in

A provision applicable to the instant case, is as follows:
"Notice of notice. Notice of dishonor may be given
either before the time of giving notice and protest,
or after the expiration of the time for notice, and the
payer may be estopped or prejudiced."

The question raised upon appeal, notice of dishonor and
payer's remedy, is largely one of fact. The question, as well
as the importance of the case, is not of itself limited. It
appears from the facts in evidence, however, that the subject of
materiality of the note was first referred to in a letter dated
August 10, 1930, by the defendant of a payment made by the
defendant Norman Ellis, as president of the Commercial Bank of
Olympia, which letter was signed by John Harrison, and was in
the language of the Commercial Bank of Olympia, Olympia, Wash.
Greatly enlarged, and in view of the collection and the disbursement
of a payment, which was not properly applied, he withdrew with a
check, who was secretary and treasurer of this company. The result
of this letter of the plaintiff was followed by a letter to reply
dated September 2, 1930, in which the receipt note was returned,
as well as a check for \$100 for interest, by the defendant,
and in which it was stated that the note would be paid September 2,
1930, and upon the instrument of E. C. Ellis and Wm. Henry Ellis.
The plaintiff testified in a deposition that the
defendant Henry Ellis in July or August, 1930, regarding the
extension of the note in question, and that the plaintiff agreed to
extend the note ninety days, provided it bore the following interest
rate, and that he also signed with E. C. Ellis regarding the
extension of the extension note, who testified that the extension
agreement was with Robert Ellis.
The plaintiff also testified that during the course of the
negotiations he sent a letter to Norman Ellis, which stated, in

substance, that the promissory note was not due until September 3rd, instead of August 3rd, and that the renewal note which plaintiff had received was not satisfactory, as the note was not indorsed by the defendants Hubert and Norman Ellis.

The answer to this letter of the plaintiff, dated August 28, 1930, is as follows:

"Note your reference to the \$10,000.00 note on which you have the endorsement of Hubert and myself. Will take this matter up with John Hoermann so that the records will be clear on this matter and assure you that when the new note is sent, if it is necessary to send same, we will endorse it as we did previously."

While the defendant Norman C. Ellis, who was called as a witness in the trial of this case, denied having had a conversation with the plaintiff regarding the extension of time, the letters in the record are sufficient evidence to the contrary. The fact that the defendant, who was president of the General Laundry Machinery Corp., offered a renewal note, as such, and thereby admitted knowledge of the maturity of the note and non-payment, would justify the plaintiff in relying on defendant's promise to indorse the note in order to extend the maturity date.

There is also the contention by the defendant that the court erred in refusing to receive evidence to show conversations that took place between the parties regarding the circumstances and reasons for the giving of the original promissory note. This ruling of the court was proper. No question is raised as to want of consideration or fraud in the execution of the promissory note in question.

The defendant also contends that there were a number of errors in the oral charge of the court to the jury; that the charge was contradictory and confusing, and erroneous in its statement of law applicable to an action of this character.

The rules of the Municipal Court of Chicago, of which this court takes judicial notice, provide under Rule 171:

...and that the removal date which indicated was
received was not satisfactory, as the date was followed by the
Department of Defense and National Intelligence.

The answer to this letter of the Ministry, dated January 10, 1950, is as follows:

I have the honor to acknowledge the receipt of your letter of the 11th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

While the defendant, J. Edgar Hoover, was on the stand as a witness in the trial of this case, he testified that with the plaintiff regarding the extension of time, the fact that the record was entitled to evidence to the contrary. The fact that the defendant, who was president of the General Land Office, had admitted that he was a former agent, and that he was a former agent of the plaintiff in relying on defendant's promise to induce the sale in order to extend the plaintiff's time.

There is also the contention of the defendant that the court acted in refusing to receive evidence to some conversations held between the defendant and the witness. The court held that the defendant had no right to introduce such evidence. The court also held that the defendant had no right to introduce evidence of the witness's previous statements to the court. The court also held that the defendant had no right to introduce evidence of the witness's previous statements to the court. The court also held that the defendant had no right to introduce evidence of the witness's previous statements to the court.

"Objections to the charge must be made before the jury retire and must specifically point out where the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made, and upon the objections being made, the judge may make such corrections as he may deem proper."

From the record it appears that the only specific objection made by the defendant to the charge given to the jury and before the jury retired, was that "there was no notice in writing of dishonor;" that in making the objection the defendant did not comply with the rule and indicate clearly the correction desired to be made, so that the court upon objections offered could make such corrections as the court deemed proper. While there was a general objection made prior to the giving of the charge to the jury, the objections as they appear in the record do not comply with the rules of the Municipal Court, and therefore the only question to be considered is that of notice to the defendant. What we have said in this opinion indicates that the court was justified in giving the charge to the jury, as far as we can determine from the objections made by the defendant.

The conclusion of this court is that the judgment is sustained by the facts, and that there is no error such as would justify a reversal. Accordingly, the judgment is affirmed.

WILSON AND HALL, JJ. CONCUR.

JUDGMENT AFFIRMED.

"Objections to the charge must be made before the jury retire and must specifically state the grounds on which they are based. If the charge is erroneous and the jury acquits, the court must indicate clearly the correction that is to be made, and upon the objection being made, the judge may make such corrections as he may deem proper."

From the record it appears that the only specific objection

made by the defendant to the charge given to the jury was before the jury retired, and that "there was no motion in writing of the nature;" and in making the objection the defendant did not comply with the rule and indicate clearly the correction desired to be made, so that the court upon objection offered could make such corrections as the court deemed proper. While there was a general objection made prior to the giving of the charge to the jury, the objection as they appear in the record is not comply with the rules of the Criminal Court, and therefore the only question to be considered is that of notice to the defendant. What we have said in this opinion indicates that the court was justified in giving the charge to the jury, as far as we can determine from the objection made by the defendant.

The conclusion of this court is that the judgment is affirmed of the facts, and that there is no error such as would justify a reversal. Accordingly, the judgment is affirmed.

FOR THE COURT.

ALBION AND BART, JJ. CONCUR.

37829

LAUREL BOOK COMPANY, a Corporation,
Plaintiff-Appellant,

v.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a Corporation,

Defendant-Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

281 I.A. 603²

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff appeals from a judgment entered upon the verdict of a jury for the defendant. The action of the plaintiff was upon a bond executed by the defendant dated June 2, 1931, in the penal sum of \$20,000, issued by the defendant to the plaintiff, and which recites that Campbell & Leunig, Inc. of New York, had entered into a written contract with the plaintiff, evidenced by instruments in writing dated May 6, 1929, May 9, 1929, and May 31, 1930. In this contract Campbell & Leunig is designated as the New York and Eastern depository and shipping agent for the plaintiff, the condition being that if Campbell & Leunig, Inc. indemnifies against any loss or damage directly arising by reason of failure to comply with the terms of said contract, then said bond is to be void, otherwise to remain in full force and effect.

It further appears that there was a breach of the condition of the bond; that Campbell & Leunig, Inc. defaulted in the performance of the contract, whereby loss and damage, directly arising by reason of the failure of Campbell & Leunig, Inc. to comply with the terms of the contract, was sustained by the plaintiff in the sum of \$11,180.92; that Campbell & Leunig, Inc. failed to indemnify plaintiff for such loss, and that the plaintiff notified the defendant of plaintiff's loss within the time limited in the bond, and that because of such breach of condition of the bond, the defendant, Hartford Accident & Indemnity Company, as surety, became liable to the

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Opinion filed June 26, 1935

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plaintiff in the sum of \$11,180.92.

The defendant in this action filed a number of pleas and amended pleas, denying liability, and denying that plaintiff suffered any loss.

Upon a trial of the issues before a jury, the plaintiff introduced the bond in evidence, together with letters dated May 6, 1929, May 9, 1929, and evidence to establish the fact that the letter dated May 31, 1930, was lost and could not be produced and that secondary evidence of its contents was received. The trial court, upon motion of the defendant, excluded the evidence offered upon the ground of variance between the declaration of the plaintiff and the proof.

The bond is the foundation of this action, and in order to establish liability of the defendant under its provisions, the plaintiff must establish a breach of the terms of the bond and the resulting damage. Failing to do so the plaintiff could not recover in this form of action. The question of variance between the declaration and the proof offered is not involved as we view this record. The motion upon the ground urged by the defendant should not have been allowed by the court. The proper practice would have been for the defendant to make a motion at the close of plaintiff's case for a directed verdict upon the ground that the plaintiff did not establish its case. The question then follows: was the evidence sufficient to justify the court in permitting the jury to consider the facts? We believe that it was. The bond and letters, the evidence of the loss of the letter dated May 31, 1930, and the proof of its contents, tend to establish the allegation of the plaintiff's declaration. The fact that the bond specifically refers to the letters, does not

plaintiff in the case of 11, 1890, 1891.

The defendant in this action filed a number of pleas and amendments thereto, denying liability, and denying that defendant was liable for the loss of the property.

Upon a trial of the issues before a jury, the plaintiff introduced the book in evidence, together with letters dated May 1, 1890, May 3, 1890, and evidence to establish the fact that the loss of the property occurred on May 1, 1890, the loss could not be avoided and that secondary evidence of its contents was received. The trial court, upon motion of the defendant, excluded the evidence offered upon the ground of variance between the declaration of the plaintiff and the proof.

The court is the foundation of this action, and in order to establish liability of the defendant under its declaration, the plaintiff must establish a breach of the terms of the bond and the resulting damage. Failing to do so the plaintiff could not recover in this form of action. The question of variance between the declaration and the proof offered is not involved as it varies from the action upon the ground stated in the declaration should not have been allowed to the court. The proper question would have been for the defendant to make a motion for a judgment of acquittal upon the ground that the plaintiff did not establish a direct verdict upon the ground that the plaintiff was not liable for the loss of the property. The question then follows: was the plaintiff entitled to testify the court in admitting the fact to consider the court to believe that it was. The court and letters, the evidence of the loss of the property dated May 1, 1890, and the proof of the loss of the property for the purpose of the plaintiff's declaration. The fact that the book specifically refers to the letters, does not

require that they be produced. It is not necessary to produce original letters in order to recover when there is evidence that the documents have been lost. Under a proper state of facts regarding the loss and the contents, such evidence should be received and secondary proof submitted to the jury.

The defendant, with considerable stress, contends that the plaintiff waived its right to recover, because of an admission in open court that there never existed a letter dated May 31, 1930, and that because of such admission the plaintiff could not recover for a breach of contract of which this alleged letter was a part. The answer to this contention is that by the admission of that fact, the defendant was not placed at a disadvantage and such admission could only bind the plaintiff if the defendant was misled by such statement. Kellyville Coal Co. v. O'Connell, 134 Ill. App. 311. A proper foundation was laid that such letter did exist and was lost or mislaid, so that the plaintiff could not produce the original. Evidence to establish its contents should have been submitted to the jury for consideration.

It will not be necessary for this court to pass upon the other questions raised, for the reason that the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

...that they be produced. It is not necessary to produce
 original letters in order to recover when there is evidence that
 the documents have been lost. Under a proper view of facts
 regarding the loss and the contents, such evidence should be
 received and secondary proof admitted to the jury.

The defendant, with commendable alacrity, contended that the
 plaintiff waived the right to recover, because of an admission
 in open court that there never existed a letter dated May 2, 1920,
 and that because of such admission the plaintiff could not recover
 for a breach of contract of which this letter I fear was a
 part. The answer to his contention is found in the admission of
 fact that the defendant was not guilty of a disclaimer and such
 admission would only show the plaintiff is not estopped and his
 law by such a statement. Kilgus v. T. Johnson, 120 Ill.
App. 211. A proper foundation was laid for such a statement
 and the loss of original, to show the plaintiff could not
 recover the original. Evidence is admitted in such cases should
 have been admitted to the jury for consideration.
 It will not be necessary for the court to pass upon the
 other questions raised, for the reason that the judgment must be
 reversed on the basis furnished for reversal itself.

REVEREND AND HONORABLE, J. J. ...

37859

D. E. STOKES,
(Plaintiff) Appellant,

v.

RICHARD MATES,
(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

281 I.A. 603³

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon an appeal by the plaintiff from a judgment entered in the Municipal Court of Chicago upon a verdict of the jury finding the defendant not guilty in a personal injury action instituted by the plaintiff. The plaintiff by his admission in his brief does not question the pleadings, instructions or rulings of the court made during the progress of the trial.

The sole question before this court is, did the court err in denying the plaintiff's motion for a new trial? The motion was based upon certain affidavits offered to the effect that one of the jurors impaneled to hear the case made an independent examination, measurements, and plat of the place in question, all unknown to the court, which the juror used in the jury room during the deliberation of the verdict. These affidavits were not considered by the court upon the hearing of this motion.

The general rule is that a verdict returned by a jury can not be impeached by affidavits containing statements made by jurors after trial which tend to impeach the verdict, and that such evidence or affidavits are not admissible for this purpose; nor can an affidavit of one of the jurors after trial be considered by the court as competent to impeach the verdict rendered by the jury. This rule has been applied and followed in Wyckoff v. Chicago City Ry. Co., 234 Ill. 613; Heldmaier v. Rehor, 188 Ill. 458; People v. Strause, 290 Ill. 259; Goldsmith v. Chicago City Ry. Co., 214 Ill. App. 34; Smith v. Smith, 169 Ill. 623, and Phillips v. Town of Scales Mound, 195 Ill. 353.

The plaintiff admits that public policy will not permit jurymen in the first instance to impeach their own verdict, still if the matter is brought to the attention of the court by evidence other than that of the jurymen, the court should hear from the jurymen upon the question. The only evidence in this record other than that of the jurymen, is the offered affidavit of Anna Murano, who stated in effect that she saw two men making measurements at the place of the accident, and that she learned later that one of the men measuring the sidewalk was a juror in the case, and the affidavit of Edwin A. Feldott, the plaintiff's attorney, who stated that the juror told affiant that he made measurements. From an examination of these two affidavits we are inclined to view them as hearsay statements and not properly admissible. The court, in discussing the admissibility of affidavits by jurors in the case of Sanitary District of Chicago, v. Cullerton, et al., 147 Ill. 385, makes a pertinent statement as to reasons for the rule, as follows:

"But to permit the affidavits of jurors to be heard, showing that the verdict to which they, on their oaths, consented, was the result of improper influence or corrupt practice, 'is condemned by the clearest principles of justice and public policy.' But few verdicts in important cases would be permitted to stand. Litigation would be increased, the widest door thrown open to fraud and perjury, and the administration of the law brought into contempt.

The affidavits of jurors showing or tending to show improper conduct on the part of the officer in charge, or of the jurors or others, can not be received for the purpose of impeaching the verdict."

For the reasons stated, we are of the opinion that the ruling of the court was not erroneous in refusing admission of the affidavits presented, and there being no other question raised, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

The Plaintiff admits that public policy will not permit
jurymen in the first instance to ignore their own reading, still
if the matter is brought to the attention of the court by evidence
other than that of the jurymen, the court should hear from the
jurymen upon the question. The only evidence in this record other
than that of the jurymen, is the official affidavit of some juror,
who stated in effect that she saw two men making movements at the
place of the accident, and that she learned later that one of the
men bearing the affidavit was a juror in the case, and the affidavit
of Abner A. Rollett, the Plaintiff's attorney, who stated that the
juror told him that he made movements. From an examination of
these two affidavits we are inclined to give them as nearly equal
weight and not properly admissible. The court, in discussing the
admissibility of affidavits of jurors in the case of Wheeler v. Wheeler
of Illinois, 111 Ill. 383, makes a pertinent
statement as to reasons for the rule, as follows:

"But to permit the affidavit of jurors to be heard,
showing that the verdict is such that, as their oath
concerned, was the result of improper influence or corrupt
motives, is contrary to the clearest principle of
justice and public policy. But the verdict is important
and would be reversed if shown. Affirmation would be
increased, the widest door thrown open to fraud and perjury,
and the administration of the law brought into contempt.
The affidavit of jurors showing or tending to show
improper conduct on the part of the witness in court, or of
the juror or others, can not be received for the purpose
of impeaching the verdict."

For the reasons stated, we are of the opinion that the
ruling of the court was not erroneous in refusing admission of the
affidavits presented, and there being no other questions raised, the
judgment of the Appellate Court is affirmed.

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ATTEST AND SEAL, 1st DECEMBER.

37865

AMERICAN NATIONAL BANK & TRUST
COMPANY, etc.,

(Plaintiff) Appellee,

v.

ILLINOIS IMPROVEMENT & BUILDING CORP.,
et al.,

(Defendants) Appellees.

On Appeal of ROBIN P. ALLEN,
(Petitioner) Appellant.

127
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

281 I.A. 603⁴

Opinion filed June 26, 1935

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is controlled by the opinion of this court filed in the cause here on appeal from the Circuit Court of Cook County, No. 37660 upon the question of the right of Robin P. Allen, by petition, to intervene, which appeal was consolidated by the order of this court with the above entitled cause No. 37865, involving the decree of sale.

The Denial of petitioner's motion for leave to intervene, and the decree of sale entered by the Chancellor are, for the reasons stated in the opinion, affirmed.

ORDER AND DECREE AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

TRUMP & INCO LIMITED, 1001
1100, TORONTO

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303 .A.1 182

Opinion filed June 26, 1935

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37581

CHARLES O'KELLY,

Petitioner - Appellant,

v.

RICHARD J. COLLINS, JOSEPH P. GEARY,
and ALBERT O. ANDERSON, Civil Service
Commissioners of the city of Chicago,
Illinois,

Respondents - Appellees.

137
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

281 I.A. 604¹

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On January 23rd, 1934, on the petition of Charles O'Kelly, a writ of certiorari issued out of the Circuit Court of Cook County directed to Richard J. Collins, Joseph P. Geary and Albert O. Anderson, Civil Service Commissioners of the city of Chicago, directing them to certify and file the portion of the official record kept and preserved by the Civil Service Commission of the city of Chicago, of date the 28th day of August, 1933, in regard to the proceedings for the removal of Charles O'Kelly, truck driver in the classified service of the Department of Public Works, Bureau of Engineering, for the city of Chicago. The sheriff of Cook County made a return showing the writ served on the Civil Service Commissioners. Thereafter the Civil Service Commissioners made a return on this writ. On March 23rd, 1934, a motion was made to quash the writ, and on April 14th, 1934, a motion was made by the petitioner to quash the record of the proceedings of respondents, the Civil Service Commission of Chicago. On April 16th, 1934, a judgment order was entered in the Circuit Court of Cook County, in which it is recited that the parties appeared in court by their counsel; that the court inspected the record, heard the arguments of counsel, and that thereupon it was ordered and adjudged by the court that the writ of certiorari issued in the cause be quashed and the petition dismissed. It is from this order that the appeal herein is taken.

CHAS. O'NEILL

Petitioner - Respondent

v.

ALBERT G. ANDERSON, Civil Service Commissioner of the City of Chicago, Illinois

Respondent - Petitioner

Opinion filed June 28, 1935

THE JUSTICE HEREIN ADVISES THE COURT OF THE FACTS.

On January 23rd, 1935, on the petition of Charles O'Neill,

a writ of certiorari issued out of the Circuit Court of Cook County directed to Robert J. Bellina, Deputy Civil Service Commissioner of the City of Chicago, directing him

to certify and file the portion of the official record and

preserved by the Civil Service Commission of the City of Chicago,

of date the 28th day of August, 1934, in regard to the proceedings

for the removal of Charles O'Neill, from office in the classified

service of the Department of Public Works, Bureau of Engineering,

for the City of Chicago. The Deputy Civil Service Commissioner, there-

showing the writ served on the Civil Service Commissioner, there-

after the Civil Service Commissioner made a return on this writ.

On March 23rd, 1935, a motion was made to quash the writ, and on

April 14th, 1935, a motion was made by the petitioner to quash the

record of the proceedings of the Civil Service Commission

of Chicago. On April 15th, 1935, a judgment order was entered in

the Circuit Court of Cook County, in which it is recited that the

parties appeared in court by their counsel; that the court proposed

the record, heard the arguments of counsel, and that although it

was ordered and adjudge by the court that the writ of certiorari

issued in the case be quashed and the petition dismissed. It is

from this order that the appeal herein is taken.

403 I.A. 304

By the return to the writ of certiorari made by the respondents, it is shown that it contains a transcript of the record of the proceedings of the Civil Service Commission of Chicago; that such Civil Service Commission notified Charles O'Kelly, - attaching copies of certain charges to the notice, - that charges had been filed against him by the Commissioner of Public Works of the City of Chicago; that a hearing on such charges was ordered held in Room 612 of the City Hall of Chicago on the 12th day of July, 1933, that on the 26th day of June, 1933, Charles O'Kelly receipted for the notice, together with a copy of the charges. It is also recited in the return that a lieutenant of police of the city of Chicago made oath that he had served O'Kelly with the notice and copy of the charges against him, signed by E. O. Hewitt, Commissioner of Public Works of the city of Chicago. By the return of the Commissioners to the writ, it is ^{further} shown that the particular offenses with which the petitioner was charged are that he wantonly disobeyed by refusing to perform his duty and render any service in his employment as civil service motor truck driver of the city of Chicago; that on May 23rd and May 24th, 1933, in obedience to the action and command of a certain labor union known as Local 726 of the City of Chicago, of which Charles O'Kelly was and is a member, he, O'Kelly, peremptorily went on "strike" as a civil service motor truck driver of the classified service of the city of Chicago, refusing to continue in the discharge of his duties in said employment, in disobedience to and defiance of the orders of his superior officers; that on the contrary, the said O'Kelly obeyed the insurrectionary command of his said union, Local 726 to "strike" with fellow members of said Local in violation of the laws of the State and the ordinances of the city of Chicago, and in defiance of the official administration of the public affairs of the city of Chicago, to which said O'Kelly owed obedience and service; that on May 20th, 1933, and thereafter from time to time, O'Kelly conspired

By the return to the writ of certiorari made by the return-
dents, it is shown that it contains a transcript of the report of
the proceedings of the Civil Service Commission of Chicago; that such
Civil Service Commission notified Charles O'Kelly, - attending to the
of certain charges to the notice, - that charges had been filed against
him by the Commissioner of Public Works of the City of Chicago; that
a hearing on such charges was ordered held in Room 514 of the City
Hall of Chicago on the 14th day of July, 1933, that on the 14th day
of June, 1933, Charles O'Kelly received for the notice, together
with a copy of the charges. It is also recited in the return that
a lieutenant of police of the city of Chicago made oath that he had
served O'Kelly with the notice and copy of the charges against him,
signed by E. O. Hewitt, Commissioner of Public Works of the city of
Chicago. By the return of the Commissioner to the writ, it is shown
that the petitioners obtained with which the petitioners was charged
are that he wantonly disobeyed by refusing to perform his duty and
render any service in his employment as civil service motor truck
driver of the city of Chicago; that on May 23rd and May 24th, 1933,
in obedience to the action and command of a certain labor union known
as local 738 of the city of Chicago, of which Charles O'Kelly was and
is a member, he, O'Kelly, deliberately went on "strike" as a civil
service motor truck driver at the classified service of the city of
Chicago, refusing to continue in the discharge of his duties in said
employment, in disobedience to and defiance of the orders of his
superior officers; that on the contrary, the said O'Kelly obeyed the
instructions and command of his said union, local 738 to "strike"
with fellow members of said local in violation of the laws of the
state and the ordinances of the city of Chicago, and in defiance of
the official administration of the public officials of the city of
Chicago, to which said O'Kelly owed obedience and service; that on
May 20th, 1933, and thereafter from time to time, O'Kelly associated

and confederated with Michael Palm, Edward Perren and divers other persons, all of whom together with O'Kelly, were members of the certain labor union hereinbefore mentioned, to thwart the public administration of the affairs and works of the Department of Public Works of the city of Chicago; that in furtherance of a conspiracy, the said O'Kelly, gave his allegiance and obedience to the insurrectionary order of the local to "strike" against the lawfully constituted government of the city of Chicago; that as a member of the local, he and other members, at a meeting of the local, proposed, passed and promulgated as an official act of the local an order for a "strike" of the motor truck drivers of the said local, including O'Kelly; that O'Kelly acted in conjunction with others to thwart, hinder, delay, embarrass and render impossible the discharge of the public service in the matter of hauling tools, supplies, equipment, materials and labor, and investigating complaints of the city of Chicago as required of the motor truck drivers in the classified service; that in furtherance of the conspiracy, O'Kelly himself did "strike", quit work and fail and refuse longer to discharge the duties and render the services exacted of him by the civil service employment of motor truck driver, and did join with other members of the said Local 726 to influence many other civil service motor truck drivers to refuse to discharge their duties.

The return also recites that the record of the Civil Service Commissioners shows that the commissioners met to hear evidence of witnesses as to and concerning the charges made against O'Kelly, and that at a hearing on July 12, 1933, held for the purpose of investigating such charges, the commissioners proceeded to and did hear the testimony of witnesses in regard thereto, and that a record of such testimony is preserved and on file in the office of the Commission, and that upon the conclusion of all the evidence and arguments, and upon such evidence, the commissioners found that the

and conferred with Michael Kelly, Edward Brown and others of the
 persons, all of whom to other with O'Reilly, were members of the
 certain laws which have been mentioned, to them the public
 administration of the affairs and work of the Department of Public
 Works of the city of Chicago; that in furtherance of a conspiracy,
 the said O'Reilly, gave his allegiance and devotion to the
 instructions very order of the local to "strike" against the local
 constituted government of the city of Chicago; that as a member
 of the local, he and other members, at a meeting of the local,
 proposed, stated and promulgated as an official act of the local an
 order for a "strike" of the motor truck drivers of the said local,
 including O'Reilly; that O'Reilly acted in conjunction with others to
 threaten, hinder, delay, embarrass and render impossible the discharge
 of the public service in the matter of hauling fuel, supplies,
 equipment, materials and labor, and investigating complaints of
 the city of Chicago as required of the motor truck drivers in the
 classified service; that in furtherance of the conspiracy, O'Reilly
 himself did "strike", quit work and fail and refuse longer to dis-
 charge the duties and render the services expected of him by the
 civil service employment of motor truck driver, and did join with
 other members of the said local 728 to influence and other civil
 service motor truck drivers to refuse to discharge their duties.
 The return also recites that the record of the civil
 service commissions shows that the consideration was in fact paid
 to O'Reilly, and that at a meeting on July 1, 1937, held for the purpose
 of investigating such charges, the commissions proceeded to and
 did hear the testimony of witnesses in regard thereto, and that a
 record of such testimony is preserved and on file in the office of
 the Commission, and that upon the conclusion of all the evidence and
 arguments, and upon such evidence, the commissions found that the

petitioner was guilty of the following: that the petitioner absented himself from his work and place of employment without leave of the superior officer; that he neglected to perform his duty of hauling tools, supplies etc., when assigned to do such work; that he failed and refused to report for duty, as ordered by the Commissioner of Public Works of the city of Chicago his superior officer; that he went on strike as a truck driver and refused to continue in the discharge of his duties when ordered to do so by his superior officer, and that he entered into a conspiracy with others to induce a strike of other motor truck drivers of the city of Chicago to the detriment of the service of such city. The return to the writ further states that thereafter the Civil Service Commission of the City of Chicago entered the further finding and order, as shown by the record of such commissioners:

"Wherefore, the Civil Service Commission finds the said Charles O'Kelly guilty to
 Absence from duty without leave or permission;
 Neglect of duty;
 Disobedience of orders;
 Insubordination to and defiance of superior officers;
 Conspiracy to thwart the administration of the public service of the City of Chicago in the Department of Public Works,
 as alleged in the foregoing charges, and by reason of which finding of guilty, it is, therefore"
 "Ordered, that the said Charles O'Kelly be and he is hereby discharged from the position of Motor Truck Driver, Department of Public Works, Bureau of Engineering, and from the service of the City of Chicago.

(Signed)

R. J. Collins
 Joseph P. Geary
 Albert O. Anderson
 Civil Service Commissioners.

Chicago, July 31st, 1933."

The first point made by petitioner is that, as an employee of the classified service, he could not be discharged, except for cause and after an opportunity to be heard in his own defense.

The return of the Civil Service Commission shows that O'Kelly was served with notice of the time and place of the hearing,

petitioner was guilty of the following: that the petitioner was
himself from his work and place of employment without leave of the
superior officer; that he neglected to perform his duty of making
tools, supplies etc., when assigned to do such work; that he failed
and refused to report for duty, as ordered by the Commissioner of
Public Works of the City of Chicago his superior officer; that he
went on strike as a motor driver and refused to continue in the
discharge of his duties then ordered to do so by his superior
officer, and that he entered into a conspiracy with others to induce
a strike of other motor truck drivers of the City of Chicago to
the detriment of the service of such city. The return to the writ
further states that thereafter the Civil Service Commission of the
City of Chicago entered the further finding and order, as shown by
the record of such commission:

"Wherefore, the Civil Service Commission finds the
said Charles J. Kelly guilty of
neglect of duty;
disobedience of orders;
indisposition to and refusal of superior officers;
conspiracy to obstruct the administration of the
public service of the City of Chicago in the
discharge of his duties;
and being in the service of the City of Chicago, and by reason of which
the City of Chicago, it is, therefore,
ordered, that the said Charles J. Kelly be and he is
hereby dismissed from the service of motor truck driver,
Department of Public Works, City of Chicago, and from
the service of the City of Chicago."

(Signed)
Charles J. Kelly
Chief of Division
Civil Service Commission,
Chicago, July 11, 1934."

The first point made by petitioner is that, as an employee
of the classified service, he could not be dismissed, except for
cause and after an opportunity to be heard in his own defense.
The return of the Civil Service Commission shows that
O'Reilly was served with notice of the time and place of the hearing.

together with a copy of the charges which had been preferred against him. It is shown that he was given every opportunity to appear and defend himself.

The further point is made that the record of the proceedings of the Civil Service Commission must be quashed on certiorari, unless the record shows by recital of the evidence, or substance thereof, or a finding of fact, that the commission has jurisdiction, acted according to law, and had cause for removing the employee.

The petitioner cited among others the case of Funkhouser v. Coffin, 301 Ill. 257, as authority. In that case, an order was entered in the Circuit Court of Cook County quashing the writ of certiorari to bring up the record of the proceedings of the Civil Service Commission of the City of Chicago showing the removal of the petitioner in that case from position of second deputy superintendent in the police department of said city, which position the petitioner held under the civil service law. On appeal to the Appellate Court, the judgment of the Circuit Court was reversed and the cause remanded with the direction to quash the proceeding. On appeal to the Supreme Court, the order of the Appellate Court was affirmed. The opinion of the Appellate Court in this case is reported in 221 Ill. App. page 14, and it is there recited that "the return of the writ shows that written charges with 41 specifications were filed; that appellant had due notice thereof and of the hearing thereon; that an investigation was had in which evidence was taken; that appellant was present in person and represented by counsel; that there was a general finding of 'guilty as charged in the within and foregoing charges,' and that the subsequent steps required by statute were duly taken." The Supreme Court there held that the Civil Service Commission was not justified in discharging the petitioner upon the showing made. In the instant case, as

together with a copy of the original petition and from the record of the
case. It is shown that he was given every opportunity to appear
and defend himself.

The further point is made that the record of the proceedings
of the Civil Service Commission may be made up of certified, unless
the record shows by itself of the evidence, of evidence thereof,
at a hearing of fact, that the Commission has jurisdiction, acted
according to law, and had cause for removal and suspension.

The petition also shows that the case of Hammer
v. Helwig, 301 Ill. 237, is authority. In that case, an order was
entered in the Circuit Court of Cook County requiring the writ of
certiorari to bring up the record of the proceedings of the Civil
Service Commission of the City of Chicago showing the removal of
the petitioner in that case from position of second deputy assistant
tenant in the police department of said city, which position the
petitioner held under the civil service law. On appeal to the
Appellate Court, the judgment of the Circuit Court was reversed and
the cause remanded with instructions to grant the proceeding. On
appeal to the Supreme Court, the order of the Appellate Court was
affirmed. The opinion of the Appellate Court in this case is
reported in 301 Ill. 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247,
248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262,
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998, 999, 1000.

In Hopkins v. Ames, 344 Ill. 527, a writ of certiorari was issued from the Superior Court of Cook County to review the proceedings and records of the Civil Service Commission of the city of Chicago, wherein a police officer was charged with neglect of duty and other misconduct. From the statement of the court in its opinion, the return made by the Civil Service Commission in the Hopkins case appears to be very similar to that in the instant case, and in passing upon what are in effect the same questions as are raised here, the Supreme Court said:

"In the recent case of Carroll v. Houston, 341 Ill. 531, this court said: 'Under a common law writ of certiorari it is not necessary that the evidence be certified or that there be a certificate of facts outside of the record but the trial must be upon the record, alone. (Donahue v. County of Will, 100 Ill. 94; Chicago and Rock Island Railroad Co. v. Whipple, 22 id. 105.) The court has no power to pass upon the findings and conclusions of the inferior tribunal but it may examine the proceeding to determine whether the inferior tribunal had jurisdiction, and the facts upon which the jurisdiction is founded must appear in the record, which also must show that the inferior tribunal acted upon evidence. ~~THE COURT HAS NO POWER TO PASS UPON THE FINDINGS AND CONCLUSIONS OF THE INFERIOR TRIBUNAL~~ If the inferior tribunal had jurisdiction to hear and determine the case and it proceeded legally, the court is powerless to review the order on the ground that the inferior tribunal wrongfully removed the defendant from office. - People v. City of Chicago, 234 Ill. 416, Joyce v. City of Chicago 216 id. 466; City of Chicago v. People, 210 id. 84; People v. Landbloom, 182 id. 241; Wilcox v. People 90 id. 186.'

In the present case the return of the civil service commission shows that specific charges were filed against Hopkins; that he was served with notice; that he appeared in person and by counsel; that evidence was heard on the charges and that he was found guilty thereon. The record

shows that the civil service commission had jurisdiction of the parties and of the subject matter, that it acted upon evidence, and that it did not exceed its jurisdiction. The circuit court, therefore, had no jurisdiction to review the findings of the civil service commission and determine whether or not its findings were erroneous."

We are of the opinion that the return of the civil service commissioners made to the writ in the instant case shows that the civil service commissioners had jurisdiction; that the facts upon which the jurisdiction is founded appear from the record; that the civil service commissioners acted upon evidence, and that such evidence was the basis of the order entered, discharging the petitioner from the service of the city of Chicago. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

shows that the civil service commission had jurisdiction
of the matter and that it was not a matter of
evidence, and that it did not exceed its jurisdiction.
The circuit court, therefore, had no jurisdiction to review
the findings of the civil service commission and its decision
was not a matter of law.

It is of the opinion that the review of the civil service
commissioners made to the writ in the instant case shows that the
civil service commissioners had jurisdiction; that the facts upon
which the jurisdiction is founded appear from the record; that the
civil service commissioners acted upon evidence, and that such
evidence was the basis of the order entered, disregarding the petition
as from the service of the city of Chicago. Therefore, the judgment
of the Circuit Court of Cook County is affirmed.

WITNESSED

RECEIVED, U.S. AND DISTRICT COURT, S. D. CHICAGO.

37590

EMMA A. PEARSON,
(Plaintiff) Appellee,

v.

THE METROPOLITAN LIFE INSURANCE
COMPANY, a corporation,
(Defendant) Appellant.

14
APPEAL FROM

1
MUNICIPAL COURT

OF CHICAGO.

281 I.A. 604²

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, the Metropolitan Life Insurance Company, seeks the reversal of a judgment of the Municipal Court of Chicago against it and in favor of plaintiff, Emma A. Pearson. The trial was before the court and a jury, and resulted in a verdict in favor of plaintiff for the sum of \$2,318.52, upon which the judgment appealed from was entered.

The action is based upon two insurance policies issued by defendant on the life of Emma A. Pearson, the plaintiff, one dated March 4th, 1924 for the sum of \$2,500.00, the other dated March 10th, 1924, for the sum of \$5,920.00. Attached to each of the policies is the provision that the "Metropolitan Life Insurance Company, in consideration of the application for this contract, as contained in the application for said policy, the latter being the basis for the issuance thereof, * * * hereby agrees, that upon receipt by the Company at its home office in the city of New York of due proof, on forms which will be furnished by the company, on request, that the insured has, while said policy and this supplementary contract are in full force and prior to the anniversary date of said policy nearest to the sixtieth birthday of the insured, become totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of said policy, so as to be prevented thereby from engaging in any

EMIL A. LARSON,

(Plaintiff),

v.

THE WESTPHALIA LIFE INSURANCE
COMPANY, a corporation,

(Defendant).

Opinion filed June 26, 1935

MR. JUSTICE EDWARD T. LEAHY delivered the opinion of the court.

By this appeal defendant, the Westphalia Life Insurance

Company, seeks the reversal of a judgment of the Municipal Court

of Chicago against it and in favor of plaintiff, Emil A. Larson.

The trial was before the court and a jury, and resulted in a verdict

in favor of plaintiff for the sum of \$2,312.50, upon which the

judgment rendered from was entered.

The action is based upon two insurance policies issued

by defendant on the life of Emil A. Larson, the plaintiff, one

dated March 4th, 1934 for the sum of \$1,000.00, the other dated

March 10th, 1934, for the sum of \$1,000.00. Attached to each of

the policies is the provision that the Westphalia Life Insurance

Company, in consideration of the application for said contract, as

contained in the application for said policy, the latter being the

basis for the insurance contract, * * * hereby agreed, that upon

receipt by the Company of its own office in the city of New York

of the profit, no part of which will be furnished by the Company, or

otherwise, that the insured and, while said policy and this applica-

tionary contract are in full force and prior to the anniversary date

of said policy nearest to the sixtieth birthday of the insured,

become totally and permanently disabled, as the result of bodily

injury or disease occurring and originating after the issuance of

said policy, so as to be prevented thereby from engaging in any

281 L.A. 504

occupation and performing any work for compensation or profit, and that such disability has already continued uninterruptedly for a period of at least three months, it will, during the continuance of such disability, 1. Waive the payment of each premium falling due under said policy and this supplementary contract, and, 2. Pay to the insured, or person designated by him for the purpose, or if such disability is due to, or is accompanied by mental incapacity, to the beneficiary of record under said policy, a monthly income of \$10 for each \$1,000 of insurance, or of commuted value of installments, if any, under said policy."

By the statement of claim filed in the case, plaintiff alleges that on the 19th day of July, 1930, she became totally and permanently disabled by reason of a disease or condition known as a fibroid tumor of the uterus, or fibroid uterus, which disease or condition has caused plaintiff great pain and anguish, and has completely and entirely incapacitated her from performing any kind of work whatsoever, and made it impossible for plaintiff to attend to her normal household duties; that the disease has made it necessary for her to be under constant medical attention; that upon the advice of her physician, an operation was performed upon her to remove certain affected parts, affected by the disease or tumor, but that notwithstanding she has not been cured and is still completely incapacitated from performing any kind of work whatsoever.

The record shows that the policy for \$2,500.00 is numbered 1, 151, 293A, and that as to this policy, on the 22nd of June, 1931, plaintiff submitted to the defendant on a form furnished by defendant a notice to the effect that because of the removal of a tumor and cysts, on July 19th, 1930, she became totally disabled so that she was wholly incapable of working. The policy for \$5,920.00 is numbered 1, 151,732, and the record shows that as to this policy, on February 27th, 1932, plaintiff delivered to defendant a like

Occupation and position and any other information as to the person, and that such disability has already continued uninterruptedly for a period of at least three months, if all, during the continuance of such disability, i. e. after the payment of such premium failed or under said policy and this notwithstanding contract, and, if, by the insured, or person designated by him for the purpose, or if such disability is due to, or is accompanied by mental incapacity, to the possibility of receipt under said policy, a monthly amount of \$10 for each \$1,000 of insurances, or of specified value of insurances, if any, under said policy.

By the statement of claim filed in the case, Plaintiff alleges that on the 10th day of July, 1930, she became totally and permanently disabled by reason of a disease or condition known as a fibroid tumor of the uterus, or fibroid uterus, which disease or condition has caused Plaintiff great pain and anguish, and has completely and entirely incapacitated her from performing any kind of work whatsoever, and made it impossible for Plaintiff to return to her normal household duties; that the disease has made it necessary for her to be under constant medical attention; that upon the advice of her physician, an operation was performed upon her to remove certain obstructed areas, affected by the disease or tumor, and that notwithstanding the fact that such operation was usually successful, and from performing any kind of work whatsoever.

The record shows that said policy for \$1,000.00 is numbered 1, 151, 521A, and that as to this policy, on the 10th of July, 1931, Plaintiff submitted to the defendant on a bona fide claim of payment a notice to the effect that because of the removal of a tumor and cysts, on July 19th, 1930, she became totally disabled so that she was wholly incapable of working. The policy for \$1,000.00 is numbered 1, 151, 731, and the record shows that on the 10th of February 1931, Plaintiff delivered to defendant a like

notice on blanks furnished by defendant, as that given as to the before mentioned policy, number 1, 151,293A.

Subsequent to the service of the notification to defendant made by plaintiff of her alleged disability, Dr. Mark Goldstine, her attending physician, at the request of an agent of defendant, made a report on blanks furnished to him by defendant, as to plaintiff's alleged disabilities, and in such report stated that such alleged disabilities were "temporary".

It is the claim of the defendant that the proof required by the terms of the policy as to plaintiff's claim of total disability, consisted of not only the insured's written statement, but also that of the attending physician, and that because Dr. Goldstine, in his report, stated that the disability was "temporary", and that because plaintiff had not furnished proofs as required, she cannot recover. It is also the claim of defendant that on the trial, plaintiff failed to prove that she is totally and permanently disabled so as to prevent her from engaging in any occupation or performing any work for compensation and profit, and that the verdict and judgment are contrary to the manifest weight of the evidence. There is no question as to the amount of the verdict and judgment.

Plaintiff testified that at the time of taking out these policies, and until the Spring of 1930, she was a school teacher near Centralia, Washington, and had charge of a school in a rural district; that she ceased working on May 16th, 1930; that prior to a year before she ceased working, she was able to walk back and forth to school, which was located over three miles from her home; that she taught eight grades, approximately fifty pupils, all day; that she had supervision over the recess and play time, played games with the pupils, and did the janitor work at the school; that approximately a year before she ceased working, she noted a change in her physical condition, that she became very tired and exhausted after any kind

notice on blanks furnished by defendant, as such given as in the
before mentioned policy, number 1, 1st, 1931.

independent to the review of the defendant's statement
made by plaintiff of her alleged disability, Dr. John Robinson, her
attending physician, at the request of an agent of defendant, made
a report on blanks furnished to him by defendant, as to plaintiff's
alleged disabilities, and in such report stated that such alleged
disabilities were "temporary".

It is the claim of the defendant that the report received
by the terms of the policy as to plaintiff's claim of total disability,
consisted of not only the insured's written statement, but also that
of the attending physician, and that because Dr. Robinson, in his
report, stated that the disability was "temporary", and that because
plaintiff had not maintained profits as required, she cannot recover.
It is also the claim of defendant that on the trial, plaintiff failed
to prove that she is totally and permanently disabled as so to prevent
her from engaging in any occupation or performing any work for one-
year, and that the verdict and judgment are contrary
to the manifest weight of the evidence. There is no doubt as to
the soundness of the verdict and judgment.

Plaintiff testified that at the time of trial and before
verdict, and until her death in 1931, she was a school teacher
and principal, teaching, and was capable of a school in a rural
district; that she ceased working on May 1st, 1930; that after a
year before she ceased working, she was able to walk with and leave
the school, which was located very close to her home; that she
taught about grades, approximately fifty to six, all day; that she
had supervision over the house and day time, having made with the
house, and did the lighter work at the school; that approximately
a year before she ceased working, she passed a number of her medical
condition, that she became very tired and exhausted after very light

of exertion after her duties at the school; that this condition started gradually in the school year of 1929 to 1930; that after the Fall of 1929, she was unable to walk to the school, or take part in any of the games; that in May, 1929, she weighed 175 pounds, and that at the time of the trial she weighed 130 pounds; that she consulted Dr. Goldstine in July, 1930, and that on August 8th, 1930, Dr. Goldstine operated on her in Chicago and removed a fibroid tumor; that she was in the hospital five weeks, and that thereafter she was at her sister's home in bed until about November, 1930; that during this time, she suffered pains in the pelvic region, which was practically continuous, and which have not yet passed away; that on April 28th, 1933, she was in a condition of continuous pain and agony in the region where her operation was had; that after a walk her exhaustion was terrible and the pain much greater; that she does not rest at night and sleeps very little, and that this condition has continued for about three years.

Dr. Goldstine, plaintiff's attending physician, testified that he first saw the plaintiff about August, 1930; that she was at that time suffering from a tumor of the womb, projecting from the womb, and severe inflammation of the organs adjacent to the uterus; that the tumor was approximately the size of a small pear, about an inch in diameter; that she had severe infection of the pelvic organs, the ovaries, tubes and the womb; that on August 8th, 1930, he performed an operation on the plaintiff at the Wesley Memorial Hospital in Chicago, removed the tumor and inserted radium to prevent bleeding; that he has seen her frequently since the operation, the last time on January 12th, or 13th, 1934, at his office; that he had treated her at other times between the date of the operation and the date when he last saw her; that he examined her every month after the operation, and that in April, 1933, he examined her in his office, and found the female organs very tender; that there

of emotion after her duties at the school; that this emotion
appeared frequently in the school year of 1900; that after
the fall of 1901, she was unable to walk to the school, as she was
in one of the forms; that in May, 1902, she weighed 130 pounds, and
lost at the time of the trial and weighed 120 pounds; that she
communicated Dr. Collette in July, 1900, and that on August 24, 1900,
Dr. Collette operated on her in Chicago and removed a fibroid tumor;
that she was in the hospital five weeks, and that thereafter she
was at her sister's home in New York about November, 1900; that
during this time, she suffered pains in the lower region, which were
essentially continuous, and which have not yet passed away; that on
April 22nd, 1901, she was in a condition of continuous pain and
spasm in the region where her operation was had; that after a while
her condition was terrible and the pain much greater; that she does
not rest at night and sleeps very little, and that this condition
has continued for about three years.

Dr. Collette, physician attending physician, testified
that he first saw the plaintiff about August, 1900; that she was
at that time suffering from a tumor of the womb, projecting from
the womb, and severe inflammation of the organs adjacent to the
womb; that the tumor was approximately the size of a small pear,
about an inch in diameter; that she had several instances of the
pelvic organs, the ovaries, tubes and the womb; that on August 24,
1900, he performed an operation on the plaintiff at the hospital;
he removed the tumor, removed the uterus and ligament called
the broad ligament; that he has seen her frequently since the opera-
tion, the last time on January 1901, or 1902, 1903, at his office;
that he has treated her at other times between the date of the
operation and the date from the last one day; that he examined her
every month after the operation, and that in April, 1901, he examined
her in his office, and found the tumor again very small; that there

was an enlargement on the left side, marked inflammation of the left organ, the ovary and tube, and a great many adhesions in the pelvic organs. This doctor stated that he had experience in the treatment of tumors similar in character ^{to that} found in the plaintiff, for a period of thirty three years; that he had treated approximately 3,000 tumors that had been removed, and also treated the patients after the operation, and that he had an opportunity to observe the effect of adhesions in different cases, and the results of the operation. This witness testified that on July 10th, 1931, plaintiff was totally and permanently disabled.

Dr. Zeitlin, a witness called by the plaintiff, testified that he had made X-ray pictures of the pelvic region of plaintiff, and that they show her actual condition as it existed on January 9th, 1934. After this doctor had been given a description of plaintiff's condition prior to her operation, and of the character of the disease found by the attending physician, and of the operation performed upon her, and of subsequent developments and conditions as testified to by her and by her attending physician, he stated that in his opinion, she was and is permanently disabled.

Two physicians called by defendant, each of whom examined the plaintiff at the request of defendant, testified that plaintiff was not permanently nor totally disabled in July, 1931.

We find nothing in the record to indicate that the forms on which Dr. Goldstine made his report were furnished to plaintiff by defendant, or were ever seen by her prior to the trial, or that she had any knowledge of or anything to do with their execution by the doctor. As stated, she, herself, did make a report as to her condition on forms furnished by defendant.

In Railway Conductors' Benefit Association v. Robinson, 147 Ill. 138, a claim was made against the Benefit Association, based

was an endorsement on the left side, which endorsement of the left
organ, the body and tube, and a great many adhesions in the pelvic
organ. This doctor stated that he had experience in the treatment
of tumors similar in character to that found in the bladder, for a period
of fairly three years; that he had treated approximately 2,000
cases that had been removed, and also treated the patients after
the operation, and that he had an opportunity to observe the effect
of adhesions in different cases, and the results of the operation.
This witness testified that on July 10th, 1901, defendant was actually
and permanently disabled.

Dr. Lettlin, a witness called by the plaintiff, testified
that he had made x-ray pictures of the pelvic region of plaintiff,
and that they show her actual condition as it existed on January 28th,
1901. After this doctor had been given a description of plaintiff's
condition prior to her operation, and of the condition of the disease
found by the attending physician, and of the operation performed upon
her, and of subsequent developments and conditions as testified to by
her and by her attending physician, he stated that in his opinion,
she was not in permanently disabled.

Two physicians called by defendant, each of whom expressed
the belief that the removal of defendant, testified that plaintiff
was not permanently and totally disabled in July, 1901.

As this finding in the record is adverse to the party of
which Dr. Lettlin was a witness, and was furnished to plaintiff by
defendant, it was not held by the trial, as in the
and any knowledge of or anything to do with their condition by the
doctor. As stated, also, defendant, did make a report as to her condition
as furnished by defendant.

In Barney Goodenough v. Goodenough, 127
Ill. 128, a claim was made against the Goodenoughs, which

upon a certificate providing for the payment of benefits to be paid in case of death of the assured. One of the defenses made was that at the time of the admission of the assured to the society, he was not in good health as claimed, but that he was then suffering from tuberculosis, and that the assured's attending physician had written a letter to the association, in which the physician had stated that for the period covering the date of the admission of the assured to such society, the assured had been suffering from pulmonary tuberculosis, and the court said:

"The competent evidence in the record seems to show that at the date of his admission to membership, he was in good health, and that the disease of which he died was subsequently contracted. The only evidence tending to show the contrary is to be found in an unsworn certificate of Dr. Whitley, a physician who claims to have attended and treated the deceased for consumption, and a letter subsequently written by him to the secretary of the association. The certificate was dated August 4, 1888, the day after Robinson's death, and the evidence tends to show that it was enclosed with or attached to the proofs of death subsequently served on the defendant. In it Dr. Whitley certifies that he had attended Robinson for a year and a half for consumption, and that he died of that disease. It appears that the secretary of the association subsequently wrote to Dr. Whitley for further information on the subject, and received from him in reply a letter in which he wrote that he had treated Robinson for the last three years of his life for pulmonary tuberculosis, and that that disease was the cause of his death. This certificate and letter seem to have constituted the evidence upon which the directors of the association acted in rejecting the complainant's claim.

There is certainly no principle of law which justifies the consideration of Dr. Whitley's letter as evidence having any tendency to prove the facts therein stated. It is a mere unsworn declaration by a third party and is clearly inadmissible. If the Doctor's certificate was a part of the proofs of death, it was admissible for the purpose of showing compliance with the conditions of the contract requiring such proofs. But the complainant was not bound by it, and even if it can be considered at all as proof of the facts certified to, its force is overcome by the evidence of the witnesses, both professional and non-professional, that Robinson, at the date of his membership certificate, was in good health, and was not afflicted with consumption."

Defendant complains of the following instruction, given by the court on behalf of plaintiff:

"You are instructed that if you believe from the evidence and under the instructions of the Court the plaintiff is

upon a certificate provided that the payment of twenty to be paid in case of death of the insured. One of the directors was that at the time of the admission of the insured to the society, he was not in good health as of late, and that he was then suffering from tuberculosis, and that the insured's attending physician had written a letter to the association, in which the physician had stated that for the period covering the date of the admission of the insured to such society, the insured had been suffering from pulmonary tuberculosis, and the board said:

"The constant evidence in the record seems to show that at the date of his admission to membership, he was in good health, and that the amount of money he died was substantially increased. The only evidence tending to show the contrary is to be found in an affidavit submitted by Dr. Hittler, a physician who claims to have attended and treated the deceased for consumption, and a letter subsequently written by him to the secretary of the association. The certificate was dated August 1, 1898, the day after Robinson's death, and the evidence tends to show that it was enclosed with or attached to the proceeds of death and recently served on the defendant. In 1898, Hittler certifies that he had attended Robinson for a year and a half for consumption, and that in the fall of that year, it appears that the secretary of the association subsequently wrote to Dr. Hittler for further information on the subject and received from him in reply a letter in which he stated that he had treated Robinson for the last two years of his life for pulmonary tuberculosis, and that that disease was the cause of his death. This certificate and letter seem to have constituted the evidence upon which the directors of the association acted in granting the beneficiary's claim. There is certainly no evidence of the kind which justifies the conclusion of Dr. Hittler's letter of evidence submitted by him to prove the facts stated. It is a mere affidavit, and is not a certificate, and is clearly inadmissible. If the court's decision is a part of the record of death, it is inadmissible for the purpose of showing the condition of the insured at the time of his death. The condition was not known by it, and even if it can be considered as a part of the record of death, it is overcome by the evidence of the defendant, both professional and non-professional, that Robinson, at the date of his membership certificate, was in good health, and was not afflicted with consumption."

Defendant's examination of the following instruction, given

by the court on behalf of plaintiff:

"You are instructed that if you believe from the evidence and under the instructions of the Court the plaintiff is

totally and permanently disabled within the meaning of the terms of this insurance policy, and if you further believe that the plaintiff submitted due proofs of loss thereof, then you should find the issues for the plaintiff."

Also, that the verdict and judgment are contrary to the manifest weight of the evidence, as already stated.

We are of the opinion that the plaintiff complied fully with the terms of the insurance policies in making her return on blanks furnished to her by the company as to her condition; that the attending physician's statement in his report to defendant that her condition was "temporary", is not binding upon her, and that the question as to whether ^{or not} ~~she~~ was, in the language of the policies, "totally and permanently disabled, as the result of bodily injury or disease *** so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit," was for the jury to consider and determine. We are also of the opinion that the court was not in error in giving the instruction complained of, and that the verdict is not contrary to the manifest weight of the evidence. Therefore, the judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

then you should find the answer for the question.

11. That the various and inconsistent statements of the witnesses, taken by the court, are in direct and positive contradiction of the evidence, as already stated.

will be in good standing and the following are to be a

with the issue of the insurance policies in which her father

...to her condition; that

the attending physician's statement in his report to defendant that

Let definition of "category" be "category".

the question as to whether or not

[illegible]

for a change in the way the program is run.

CONFIDENTIAL

and for the jury to consider and determine.

...that the court was not in error in giving the defendant the benefit of the doubt.

...that the verdict is not contrary to the weight of the evidence.

... of the evidence, therefore, the defendant is guilty.

CONFIDENTIAL

[illegible]

37639

EVELYN PRATT ELLITHORPE,
(Plaintiff) Appellant,
v.
GLENN E. HOLMES, et al.,
(Defendants) Appellees.

15
APPEAL FROM

SUPERIOR COURT

281 I.A. 604³
COOK COUNTY.

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court of Cook County entered on May 4th, 1934, by which it is ordered that the bill of complaint filed in the cause as amended, together with a supplemental bill of complaint, be dismissed for want of equity. The original bill was filed by the complainant, Evelyn Pratt Ellithorpe, on April 30th, 1928. To this bill an amendment was filed, and after the defendants had answered, the cause was referred to a Master, who took testimony and made a report, which was filed on December 23rd, 1932. The supplemental bill referred to was filed on December 20th, 1932. Exceptions to the Master's report by each side were heard, complainant's overruled, defendants' sustained, and the decree appealed from entered.

The original and amended bills allege, among other things, that on August 31st, 1926, an agreement was entered into between Glenn E. Holmes, party of the first part, and Walter L. Williams, Earl W. De Moe, William H. Montgomery, F. B. A'Hara, M. W. Humphrey, A. J. Lindsley, G. S. Ellithorpe, Dann Sheehan, G.M. Culver and Robert A. Leitz, parties of the second part, by the terms of which it is set forth that Glenn E. Holmes had therefore entered into a 99 year lease dated July 9, 1926, from Mark L. Kimball, as trustee, for certain premises in the city of Chicago, for a term commencing August 1st, 1926, and ending July 31st, 2025; that it was anticipated that Holmes would shortly enter into an additional 99 year lease for certain other property, and that the parties to the agreement desired to make clear the status of the

ownership of such leaseholds with reference to their respective rights therein. The substance of this agreement as set forth in the bill, is that Holmes would hold the leases for the benefit of himself and the other parties to the agreement, and that the respective interests of the various parties therein would be as follows:

| | |
|-----------------------|------------|
| Earl W. DeMoe | 100/479ths |
| William B. Montgomery | 100/479ths |
| Walter Williams | 100/479ths |
| Glenn E. Holmes | 100/479ths |
| F. B. A'Hara | 20/479ths |
| M. W. Humphrey | 20/479ths |
| A. J. Lindsley | 10/479ths |
| G. S. Ellithorpe | 10/479ths |
| Dan Sheehan | 5/479ths |
| G. M. Culver | 10/479ths |
| Robert A. Leitz | 4/479ths |

The contribution of each of the parties to the agreement, agreed to be forthcoming, is then set forth. The contract further provides that "the party of the first part, (meaning Glenn E. Holmes), hereby covenants and agrees that he will not sell, encumber or otherwise dispose of the leasehold estates acquired or to be acquired by him for the benefit of the parties hereto without being authorized to do so by not less than two-thirds in amount of the beneficial interest herein; and the parties hereto hereby authorize and empower the party of the first part to sell, transfer, encumber or otherwise dispose of said leasehold estates and any of them at any time upon the authorization and direction of not less than two-thirds in amount of the beneficial interests hereunder. Upon the sale of the leasehold estates, the net proceeds derived therefrom, after deducting all expenses, shall be distributed among the parties hereto in the following manner; There shall first be repaid to the parties hereto the amounts of their respective capital contributions without interest, except that the amount paid to the party of the first part shall be his capital contribution less the sum of twenty-five thousand dollars. Any remaining amount realized from the sale of said leasehold estates

shall be distributed among the parties hereto according to their respective beneficial interests therein. Parties hereto agree that first party shall have power by and with consent of a majority in amount of beneficial interests herein, to manage and operate the leasehold estates and buildings thereon; to execute and renew leases, collect rents and in general to do all things necessary and requisite for management, maintenance and preservation of leasehold properties; provided that nothing herein contained shall require first party to attend such management personally, and he shall have right to employ rental and other agents in his discretion to manage property and collect rents."

The original bill and the amendment further allege that G. S. Ellithorpe assigned his interest in what is referred to as "said trust estate", to the complainant; that there was conveyed to Holmes three 99 year leasehold estates by leases dated July 9th, 1926, to the premises described in the bill as 22-24-26-28-30 and 32 West Lake Street in Chicago, which was a part of the trust estate described in the agreement, and which premises were at that time improved, some with four and five story buildings, and one with a one story building; that the title to the entire premises was taken by Holmes for all the parties to the agreement; that on October 4th, 1926, complainant paid Holmes, as trustee, \$5,000.00 for her contribution for her interest in the leasehold estates, and the other parties paid Holmes their proportionate share; that in violation of the terms of the agreement, and of his duties as trustees, Holmes, together with others, on November 26th, 1927, fraudulently entered into an agreement with H. O. Stone & Company wherein and whereby it was agreed that Holmes would cause a building corporation to be known as the Dearborn-Lake Building Corporation to be organized, and further agreed that such organization would assign to this corporation all the leasehold

shall be distributed among the parties herein according to their respective beneficial interests therein. Parties hereto agree that first party shall have power to and the consent of a majority in amount of beneficial interests herein, to manage and operate the household estate and household affairs; to execute and convey leases, collect rents and in general to do all things necessary and prudent for management, maintenance and preservation of household properties; provided that nothing herein contained shall require first party to attend such management personally, and he shall have right to employ rental and other agents in his discretion to manage property and collect rents.

The original bill and the amendment further allege that O. E. Ellithorpe assigned his interest in what is referred to as "said trust estate", to the complainant; that there was conveyed to Holmes three 33 year leasehold estates by lease dated July 20th, 1930, to the premises described in the bill as 15-24-35-10-10 and 25 West Lake Street in Chicago, which was a part of the trust estate described in the agreement, and which leases were at that time improved, each with four and five story buildings, and one with one story building; that the title to the entire premises was taken by Holmes for all the period to the present; that on October 1st, 1930, complainant told Holmes, as trustee, \$2,000.00 for his contribution for his interest in the household estate, and the other parties told Holmes their proportionate share; that in violation of the terms of the agreement, and of his duties as trustee, Holmes, together with others, on November 15th, 1937, fraudulently intruded into an agreement with E. W. Stone & Company wherein and whereby it was agreed that Holmes would make a building contribution to be known as the Dearborn Lake Building Corporation to be organized, and further agreed that such contribution would be used to build and operate all the buildings

estates hereinbefore mentioned, and sell to H. O. Stone & Company an issue of bonds of \$1,000,000.00 to be made by the Dearborn-Lake Building Corporation, said bonds to be secured by a trust deed on such leasehold estate; that Holmes further agreed to execute a trust deed conveying all of the leaseholds, together with the buildings thereon, to the Chicago Title & Trust Company, which latter corporation was to issue a title guarantee policy for \$1,000,000.00, showing the said trust deed to be a first lien on the premises. The bill further alleges that by this last mentioned agreement, the Dearborn-Lake Building Corporation would erect a ten story building on the premises described, and that H. O. Stone & Company agreed to buy the bonds to be issued, as above set forth. In general, the further allegations of the bill are that Holmes was without authority under the terms of the agreement between the parties to enter into the agreement suggested with H. O. Stone & Company and with the Chicago Title & Trust Company. The prayer of the original bill is that Holmes be removed as trustee; that he make an accounting for rents collected; that he be restrained from demolishing the buildings on the leasehold estates and ^{erecting} from ~~a~~ new ten story building, thereon and from making any agreement for a lease of the above described premises to the Dearborn-Lake Building Corporation.

As stated, an answer was filed to the original bill, as amended, and the matter was referred to a Master in Chancery, who heard testimony and made a report.

Shortly after the Master's report was made public, and before it was filed, a supplemental bill was filed by the complainant in which she alleged, in addition to most of the matters set forth in the original bill and amendment thereto, that since the filing of her bill, defendants in furtherance of a conspiracy, had demolished the buildings on the premises referred to, and caused a new building

estate heretofore mentioned, and sell to H. O. Stone & Company
 an issue of bonds of \$1,000,000.00 to be made by the Government-
 Building Corporation, said bonds to be secured by a trust deed on
 such leasehold estate; that Holmes further agreed to execute a
 trust deed conveying all of the leaseholds, together with the
 buildings thereon, to the Chicago Title & Trust Company, which I later
 corporation was to issue a title guarantee policy for \$1,000,000.00,
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 bill further alleges that by this last mentioned agreement, the
 Government-Lake Building Corporation would erect a ten story building
 on the premises described, and that H. O. Stone & Company agreed to
 pay the bonds to be issued, as above set forth. In General, the
 further allegations of the bill are that Holmes was without authority
 under the terms of the agreement between the parties to enter into
 the agreement suggested with H. O. Stone & Company and with the
 Chicago Title & Trust Company. The purport of the original bill is
 that Holmes be removed as trustee; that he make an accounting for
 rents collected; that he be restrained from collecting the rents
 on the leasehold estate and ^{erecting} ~~from~~ the same any building, thereon and
 from making any agreement for a lease of the above described premises
 to the Government-Lake Building Corporation.
 As stated, an answer was filed to the original bill, in
 which the matter was pleaded as a matter in equity, and
 denying the allegations of the bill.
 Shortly after the answer's filing was made public, the
 before it was filed, a supplemental bill was filed by the complainant
 in which she alleged, in addition to most of the matters set forth
 in the original bill and amended answer, that since her filing of
 her bill, defendants in furtherance of a conspiracy, had threatened
 the buildings on the premises referred to, and caused the same to be

to be erected on the land without her consent; that at the time of the filing of the supplemental bill, foreclosure proceedings were pending to foreclose a trust deed given to secure an indebtedness of \$1,000,000.00 of first mortgage bonds issued by H. O. Stone & Company; that on December 27th, 1927, and prior thereto, complainant owned an interest in the leasehold estates held by Holmes as trustee, as alleged in the original bill, to the extent of 10/479ths^{thereof;} that at that time, her interest therein was of the reasonable value of \$20,900.00; that for the purpose of defrauding complainant out of her rights, and without her consent, Holmes had caused the leasehold estates to be sold to the Dearborn-Lake Building Corporation for \$1,000,000.00, which was the reasonable and true value of the leasehold estates; that the injunction relief asked for in the original bill was, at the time of the filing of the supplemental bill, inadequate and impossible to perform, and in this supplemental bill she asks damages to the amount of \$20,900.00, with interest at the rate of 5% from December 27th, 1927.

It is the claim of the complainant that the \$5,000.00 invested in the deal in question was her money, that she did not consent to the sale of these leases, and that Holmes had no authority to do the things which he did. Defendants' position is that the money was invested by Ellithorpe, that he signed the agreement, and that it was never divulged to the defendants herein, or any of them, until not long before the bill was filed, that complainant had any interest in the transaction, and that Holmes acted within the power conferred upon him.

The record indicates that G. S. Ellithorpe is the husband of the complainant, and one of the persons who entered into the agreement dated August 31st, 1928; that prior to the making of this agreement, and up until April 3rd, 1928, he was employed by Glenn E.

Holmes, Inc., a corporation; that Glenn E. Holmes, Inc., was a dealer in automobiles in and about the loop district of Chicago, and that in the year 1926 Ellithorpe, who was acting in the capacity of confidential secretary and assistant to Holmes, at Holmes' request, made an investigation to determine whether or not there was available in the loop district of Chicago a site for a public garage, and that he and Holmes interested others in the formation of the syndicate referred to, composed of Holmes, Ellithorpe and the other individuals, who later signed the agreement to acquire a site on which it was contemplated that a building be erected, which would serve as a public garage and a place to conduct the automobile business of Glenn E. Holmes, Inc.; that thereafter three leases of abutting properties were negotiated by Holmes; that after the first of these leases was executed, the terms of the agreement between the syndicate members was reduced to writing, as set forth in the bill, and that it was anticipated by the parties that they would enter into two additional leases for other property.

Holmes testified in substance that while negotiations for these leases were in progress, Ellithorpe had expressed a desire to become a member of the syndicate, and had stated that his wife had money, and that at that time, Ellithorpe owed Holmes \$3,000.00, which Ellithorpe had borrowed for the construction of a home. This is not denied.

It is not disputed that in the work of promoting the erection of the building on this leased property, Ellithorpe; the husband of complainant, was an active participant. The record indicates that it was he who brought the architect to prepare the plans for this building to Holmes; that on November 1st, 1927, after a meeting attended by all the persons named in the original agreement, as set forth in the bill, including Ellithorpe, Ellithorpe and this architect went

Holmes, Inc., a corporation; that Glenn E. Holmes, Inc., was a dealer in automobiles in and about the local district of Chicago, and that in the year 1935 Ellithorpe, who was acting in the capacity of confidential secretary and assistant to Holmes, at Holmes' request, made an investigation to determine whether or not there was available in the local district of Chicago a site for a public garage, and that he and Holmes interested others in the formation of the syndicate referred to, composed of Holmes, Ellithorpe and the other individuals, who later signed the agreement to acquire a site on which it was contemplated that a building be erected, which would serve as a public garage and a place to conduct the automobile business of Glenn E. Holmes, Inc.; that thereafter three leases of building properties were negotiated by Holmes; that after the first of these leases was executed, the terms of the agreement between the syndicate members was reduced to writing, as set forth in the bill, and that it was anticipated by the parties that they would enter into two additional leases for other property.

Holmes testified in substance that while negotiating for these leases with the syndicate, Ellithorpe had expressed a desire to become a member of the syndicate, and had offered that his wife had money, and that at that time, Ellithorpe would either \$2,000.00, which Ellithorpe had borrowed for the construction of a home. This is not denied.

It is not disputed that in the work of promoting the erection of the building on this leased property, Ellithorpe, the husband of Ellithorpe, was an active participant. The record indicates that it was he who brought the syndicate to prepare the plans for this building to Holmes; that on November 1st, 1937, after a meeting attended by all the persons named in the official agreement, as set forth in the bill, including Ellithorpe, Ellithorpe and this witness went

to a number of cities to examine public garages, the purpose evidently being to inform themselves fully as to the character of a building which should be erected on the premises in question. Even though the money paid into the syndicate was obtained by Ellithorpe from his wife, she participated in the transaction through her husband and permitted him to proceed as he did. From all the circumstances, the others could reasonably presume that Ellithorpe had the authority to sign the agreement and to proceed with the other members of the so-called Holmes syndicate in the furtherance of the plan to erect the building in dispute. When the \$5,000.00 was paid to the syndicate fund by Ellithorpe, it is shown that it was paid by a cashier's check made payable to his order, and that Ellithorpe prepared the deposit slip for the deposit of the check, gave these to the bookkeeper of the Holmes institution who had charge of the account, and the payment was credited to Ellithorpe's personal account, but that thereafter, without notice to any of the other parties to the agreement, he had assigned his interest in what was referred to as the Holmes syndicate, to the complainant. Some time after this, without the proven knowledge of any of the other parties to the transaction, Ellithorpe caused the word "Mrs." to be placed before his name, G. S. Ellithorpe, on the books containing the accounts of the syndicate, presumably for the purpose of showing that the payment was made by the complainant. The record further indicates that on April 3rd, 1928, Ellithorpe resigned his position with the Holmes corporation, and that on that date, Mrs. Ellithorpe notified the members of the corporation that she had been informed that they had conveyed the property to a corporation, organized for the purpose of erecting a building thereon, and that she had never consented to anything of that sort, and that she had never authorized anyone to act for her in that regard.

to a number of offices to examine public records, and to
exhaustively going to inform themselves fully as to the character of a
building which should be erected on the premises in question. When
though the money was into the syndicate was obtained by Ellithorpe
from his wife, she participated in the transaction through her hus-
band and permitted him to proceed as he did. From all the circum-
stances, the others could reasonably presume that Ellithorpe had the
authority to sign the agreement and to proceed with the other members
of the so-called Holmes syndicate in the purchase of the land
to erect the building in dispute. When the £7,000.00 was paid to
the syndicate by Ellithorpe, it is shown that it was paid by
a cashier's check made payable to his order, and that Ellithorpe
prepared the deposit slip for the receipt of the check, gave these
to the bookkeeper of the Holmes syndicate and was charge of the
account, and the payment was credited to Ellithorpe's personal
account, but that thereafter, without notice to any of the other
parties to the agreement, he had assigned his interest in what was
referred to as the Holmes syndicate, to the complainant. Some time
after this, without the proven knowledge of any of the other parties
to the transaction, Ellithorpe caused the word "and" to be placed
before his name, J. W. Ellithorpe, on the books containing the
accounts of the syndicate, presumably for the purpose of making
it the payment was made by the complainant. The record further
indicates that on April 24, 1905, Ellithorpe resigned his position
with the Holmes syndicate, and that on that date, Mrs. Ellithorpe
notified the members of the syndicate that she had been informed
that they had conveyed the property to a corporation, organized for
the purpose of erecting a building thereon, and that she had never
consented to anything of that sort, and that she had never authorized
anyone to act for her in that regard.

Mrs. Ellithorpe testified that at about the time of the execution of the so-called syndicate agreement set forth in the bill, she gave her husband three checks, and that shortly thereafter he exhibited to her an assignment made by him to her of his interest in the Holmes syndicate; that the money represented by the cashier's checks paid into the syndicate was hers, and that Mr. Ellithorpe asked her in October, 1927, to take an interest in the Dearborn-Lake Building Corporation in lieu of her syndicate interest, but that she refused to do so. There is no evidence that any of the other parties to the agreement, knew of this assignment. Ellithorpe testified that he had read the loan agreements which had been sent to him, was familiar with their terms, and had negotiated with the parties for certain revisions to be made in case leases could be had for all the properties which were afterward used. The record also indicates that after the plans for the loans were completed, and the plans for the building to be erected had been made, it was Ellithorpe who served notices on the tenants of the old buildings, requiring them to vacate the premises by May 1st, 1928, and that it was he who had charge of securing the vacation of these premises by certain tenants who had leases upon them. It is further indicated that, together with the architect, Ellithorpe obtained the building permit for the erection of the building in question. While he does testify that he objected to the transfer of these properties to the corporation, his testimony in this regard is disputed. The record also indicates that it was not until a controversy between Holmes and Ellithorpe over certain commissions claimed by Ellithorpe took place, that there was any disagreement between them.

the persons representing
There is no question but that two thirds in amount of the beneficial interests in the agreement authorized Holmes to proceed as it is alleged he did, but in addition to the claim that the contribution to the fund provided for in the contract between the parties was

Mr. Littlepage testified that at about the time of the

execution of the so-called syndicate agreement and lease in the
bill, she gave her husband three checks, and that exactly thereafter
he exhibited to her an instrument made by him to her of his interest
in the Holmes syndicate; that the money represented by the checks
was paid into the syndicate and bank, and that Mr. Littlepage

was not in October, 1937, to take an interest in the Reformed-Lake
Building Corporation in lieu of her syndicate interest, but that she
refused to do so. There is no evidence that any of the other parties

to the agreement, knew of this assignment. Littlepage testified
that he had read the loan agreement which had been sent to him, and
familiar with their terms, and had negotiated with the parties for

cert in relation to be made in case I was made to pay for all the
property which was offered. The record also indicated that
after the plans for the loans were completed, and the plans for the
building to be erected had been made, it was Littlepage who served

notices on the tenants of the old building, requiring them to vacate
the premises by May 1st, 1938, and that it was he who had charge of
securing the vacation of these premises by gift in January 1938 and had

leased upon them. It is further indicated that, together with the
architect, Littlepage obtained the building permit for the erection of
the building in question. While he does testify that he objected to
the transfer of these properties to the corporation, his testimony

in this regard is disputed. The record also indicates that it was not
until a controversy between Prince and Littlepage over certain
considerations claimed by Littlepage took place, that there was any
disagreement between them.

the persons representing
There is no question but that the entire amount of the
beneficial interest in the agreement and leased Holmes is provided
as it is alleged he did, but in addition to the claim that the assign-
ment to the fund provided for in the contract between the parties was

made by the complainant, and that she had not consented, in any way, to the assignment of these leases for the purpose of erecting the building referred to, it is insisted by complainant that, under the syndicate trust agreement, Holmes had no right to sell, transfer and assign the leasehold estates upon the authorization and direction of two thirds of the beneficial interest in the syndicate for anything but cash. In other words, that even if authorized to do so, he had no right to assign these leases for the purpose of erecting a building on the property and to finance the project. On this point, attention is again directed to the language of the contract, which is that the parties hereto hereby authorize and empower the party of the first part to "sell, transfer, encumber or otherwise dispose of said leasehold estates, and any of them at any time***. Upon the sale of the leasehold estates, the net proceeds derived therefrom after deducting all expenses, shall be distributed among the parties hereto in the following manner: There shall first be repaid to the parties hereto the amount of their respective capital contributions without interest, except that the amount paid to the party of the first part shall be his capital contribution, less the sum of \$25,000.00. Any remaining amount realized from the sale of said leaseholds shall be distributed among the parties hereto according to the respective beneficial interest therein. Parties hereto agree that first party shall have the power by and with consent of a majority in amount of beneficial interests herein, to manage and operate the leasehold estates and buildings thereon; to execute and renew leases, collect rents, and in general, do all things necessary and requisite for the management, maintenance and preservation of leasehold properties." If it were not for the provision in the contract between the parties to this syndicate agreement that upon the sale of the leasehold estates, the net proceeds derived therefrom, after deducting all

made by the complainant, and that she has not commenced, in any way,
in the possession of these lands for the purpose of erecting the
building referred to, it is insisted by complainant that, under the
synthetic trust agreement, defendant has no right to sell, transfer and
vest the lands and estate upon the authorization and direction
of two thirds of the beneficial interest in the synthetic for any-
thing but cash. In other words, that even if authorized to do so, he
had no right to assign these lands for the purpose of erecting a
building on the property and to finance the project. On this point,
attention is again directed to the language of the contract, which
is that the parties hereto hereby authorize and empower the party of
the first part to "sell, transfer, encumber or otherwise dispose of
said lands and estate, and any of them or any interest therein. Upon the
sale of the lands and estate, the net proceeds derived therefrom
after deducting all expenses, shall be distributed among the parties
hereto in the following manner: There shall first be paid to the
parties hereto the amount of their respective capital contributions
without interest, except that the amount paid to the party of the first
part shall be his capital contribution, less the sum of \$25,000.00.
Any remaining amount realized from the sale of said lands and estate
be distributed among the parties hereto according to the respective
beneficial interest therein. The parties hereto agree that this party
shall have the power of and with consent of a majority in amount of
beneficial interests herein, to manage and operate the lands and
estate and buildings thereon; to execute and convey leases, collect
rents, and in general, to do all things necessary and convenient for
the management, maintenance and preservation of lands and buildings.
It is agreed that the provisions in the agreement between the parties
to this synthetic agreement that upon the sale of the lands and
estate, the net proceeds derived therefrom, after deducting all

expenses, should be distributed among the parties by first repaying them the amounts of their respective contributions, and that any remaining amount realized from the sale of the leasehold estates should be distributed according to their respective interests, there would be little difficulty in making a determination here. Upon these two questions, we call attention to the case of People v. City of Chicago, 216 Ill. 537, where the court construed Section 2 of Article 8 of the Constitution of 1870, which provides that "all lands, moneys or other property, donated, granted or received for school, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such grants were made." The question in that case arose as to whether ^{not} or ~~no~~ the word "proceeds" included lands acquired through the exchange of school lands for other real estate, and the Supreme Court held that, "taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with, and the lands received would be the proceeds." Citing Phelps v. Harris, 101 U. S. 370.

In Phelps v. Harris, *supra*, the court construed a will by which a trustee was given "full power to dispose of all of any portion of said property (consisting of real estate) which might be left to said children and invest the proceeds in such manner as he might think proper for their benefit," and in determining the meaning of the words "dispose of", the Supreme Court said:

"The expression 'to dispose of' is very broad, and signifies more than 'to sell'. Selling is but one mode of disposing of property. It is argued, however, that the subsequent direction to invest the proceeds indicates that a sale was meant. But this does not necessarily follow. Proceeds are not necessarily money. This is also a word of great generality. Taking the words in their ordinary sense, a general power to dispose of land or real estate

and to take in return therefor such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with; and the lands received would be the proceeds."

We are of the opinion that the power given Holmes by the members of the syndicate to "sell, transfer, encumber or otherwise dispose of said leasehold estates and any of them at any time", together with the other powers granted him, included the power to assign these leases and to enter into the agreement for the erection of the building and the financing thereof, for and on behalf of the members of the syndicate, and that the provisions of the contract with regard to the disposition of the proceeds of the sale do not limit this power. Further, in so far as complainant is concerned, in view of the fact that her husband as her agent, or her husband as principal, as the case might be, was an active participant in most all of the preliminaries leading up to the final consummation of the deal, and was fully cognizant of what was doing, we are of the opinion that she cannot now complain.

Complainant's prayer is that she be compensated in the sum of \$20,900.00, which she estimates to be her proportionate share of the \$1,000,000.00 value of these properties, upon the theory, presumably, that the proportion subscribed by her husband in the syndicate is worth that much. We find no evidence whatever in the record as to the value of complainant's alleged holdings upon which the court would be justified in entering a money decree in her favor, even presuming that all of her other contentions were well founded. Therefore, the decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

and to the in return for such proceeds as may be
received, will include the cost of disposing of such lands
change for other lands. It would be a disposal of the
lands, and the lands received would be the
proceeds."

It is of the opinion that the money given to the
members of the syndicate to "sell, transfer, mortgage or otherwise
dispose of said lands" was not of them at any time,
together with the other money, included in the power to
sell in these lands and to enter into the agreement for the location
of the building and the financing thereof, for and on behalf of the
members of the syndicate, and that the provisions of the contract
with regard to the disposition of the proceeds of the sale do not
limit this power. Further, in so far as completion is concerned, in
view of the fact that her husband as her agent, was not present as
principal, as the case might be, was an active participant in most
all of the preliminary dealings up to the final consummation of the
deal, and was fully cognizant of what was going on, we are of the opinion
that she cannot now complain.
Complainant's prayer is that she be compensated in the sum
of \$20,000.00, which she estimated to be her proportionate share of
the 1,000,000.00 value of these properties, upon the theory, presen-
tly, that the proportion suggested by her husband in the syndicate
is worth that much. We find no evidence whatever in the record as to
the value of complainant's alleged holding upon which the court
could be justified in awarding a money decree in her favor, even
assuming that all of her other contributions were well founded. There-
fore, the decree of the Superior Court of Cook County is affirmed.

WITNESSED

WITNESSED, J. A. AND VICTOR, J. J. JUDGE.

37663

IDA CROMMIE,

Plaintiff and Appellee,

v.

INTERNATIONAL HARVESTER COMPANY, a
Corporation,

Defendant and Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

231 I.A. 604⁴

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County against the defendant, International Harvester Company, a corporation, for the sum of \$2,368.18, entered on January 22nd, 1934. The action is based upon a certificate of membership in the Employees' Benefit Association of the International Harvester Company, and was brought to the May term 1932 of the Circuit Court of Cook County. The trial was by jury, and at the close of all the evidence, and upon motion of plaintiff's counsel, the court directed the jury to find for the plaintiff.

The declaration recites inter alia that the certificate referred to was issued by the defendant to one Willie Prince on April 20th, 1925, and delivered to Prince, and for the consideration of the premium paid by Prince to the defendant, it promised to pay to plaintiff, Ida Crommie, mother of Willie Prince, for the loss of the life of Willie Prince, through accidental means, the sum of \$1,600.00. It is further alleged in the declaration that Willie Prince, to whom the certificate was issued, died on July 16th, 1925, from a bodily injury, directly and independently of all other causes, through accidental means, and while said Prince was a member in good standing in the Employees' Benefit Association of the International Harvester Company, and while Prince was in the employ of the International Harvester Company; that the certificate of member-

THE COURT,

WITNESSES AND EXHIBITS,

IT

INTERNATIONAL TRAVEL COMPANY, a
Corporation,

Respondent and Defendant.

IN COURT ROOM

COOK COUNTY,

231 I.A. 604

Opinion filed June 28, 1935

AND THE COURT HAS CONSIDERED THE OPINION OF THE COURT.

THIS IS AN APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT OF

COOK COUNTY, IN CASE NO. 10,355-10, ENTERED ON JANUARY 22ND,

1934. THE ACTION IS BASED UPON A CONTRACT OF EMPLOYMENT IN THE

EMPLOYER'S SERVICE CONTRACT OF THE INTERNATIONAL TRAVEL COMPANY,

AND WAS BROUGHT BY THE DAY FROM 1934 OF THE CIRCUIT COURT OF COOK

COUNTY. THE TRIAL WAS BY JURY, AND AT THE CLOSE OF ALL THE EVIDENCE,

AND AFTER REVIEW OF HENRI'S EVIDENCE, THE COURT RENDERED THE JURY

AS FIND FOR THE PLAINTIFF.

THE DECISION REMAINS FINAL WITH THE COURT.

RETURNED TO THE COURT BY THE RETURN TO THE CIRCUIT COURT OF

COOK COUNTY, 1935, AND RENDERED TO THE COURT, AND THE CONSIDERATION

OF THE JURY'S FINDING OF FACTS TO THE COURT, IT IS ORDERED TO THE

TO REVERSE, THE COURT, ORDER OF THE CIRCUIT COURT, FOR THE REASON OF

THE LACK OF EVIDENCE, THROUGH CIRCUMSTANTIAL EVIDENCE, THE COURT

1, 1935. IT IS FURTHER ORDERED IN THE REVERSAL THAT THE CIRCUIT

COURT, TO SHOW THE REVERSAL WAS ISSUED, AND ON JULY 1ST, 1935,

FROM A BODY OF EVIDENCE, DIRECTLY AND INDEPENDENTLY OF ALL OTHER EVIDENCE,

THROUGH CIRCUMSTANTIAL EVIDENCE, AND WHILE THE CIRCUIT COURT WAS A MEMBER IN

GOOD STANDING IN THE CIRCUIT COURT, HENRY'S EVIDENCE OF THE REVERSAL

NATIONAL TRAVEL COMPANY, AND WHILE THE CIRCUIT COURT WAS IN THE COURT OF

THE INTERNATIONAL TRAVEL COMPANY; IN A REVERSAL OF EVIDENCE.

ship was in full force and effect at the time of his death, and that the death of Prince was caused by his being struck by a railroad train. It is further recited in the declaration that at the time of the death of Prince, notice thereof was duly given to the defendant, that plaintiff had furnished all necessary information and evidence and notice of the death of Prince, and had demanded that the death benefit, as provided by the terms and conditions of the certificate, be paid to the plaintiff. It is to be noted that the action was not brought until seven years after the death of Prince.

The application of Prince for membership in the association was received in evidence, and is in words and figures as follows:

"Certificate No. D 52759
Registered.
Carded.
Last No. D 51198

CLASS B

Application for membership in
Employees' Benefit Association
International Harvester Company

Name of Company International Harvester Company
Employed at Deering Works, Occupation Laborer, Date
entered Service 4-13-25
Check No. 323 Dept. #G. I. Nationality American Colored

To the Superintendent of Employees' Benefit Association,
International Harvester Company:

I, Willie Prince, being 22 years of age, and residing
Christian name in full

at No. 408 N. Paulina Street in the City of Chicago,
(State)

in the County of Cook and (Province) of Illinois, now employed by the above named Company do hereby apply for membership (Class B) in said Employees' Benefit Association, and agree to be bound by the regulations of said Association, a copy of which has been by me received, and by any other regulations of said Benefit Association hereafter adopted and in force during my membership.

I also agree, request and direct that said Company, by its proper agents, and in the manner provided for in such rules, shall, during the continuance of my employment, apply as a voluntary contribution from any wages earned by me under said employment, one and one-half (1½) per cent of my wages, for the purpose of securing the benefits provided in the regulations for a member of Class B of said Association.

with me in full force and effect at the time of his death, and that the death of Prince was caused by the being struck by a railroad train. It is further stated in the declaration that at the time of the death of Prince, notice thereof was duly given to the defendant, that Plaintiff had furnished all necessary information and evidence and notice of the death of Prince, and had demanded that the death benefit be provided by the terms and conditions of the certificate, as well to the Plaintiff. It is to be noted that the action was not brought until seven years after the death of Prince.

The application of Prince for membership in the association was received in evidence, and is in words and figures as follows:

Application to the Association
for membership in the Association
of the Association of Employees
of the Association of Employees
of the Association of Employees
of the Association of Employees

Application for membership in
the Association of Employees
of the Association of Employees
of the Association of Employees

Name of Company International Harvester Company
Employed at Working Place, Location, Date
Entered Service 4-1-1911
Class No. 1000, 1. I. International Harvester Company
To the Association of Employees, Benefit Association,
International Harvester Company;
I, Willie Prince, being 35 years of age, and residing
at the above address in full

at the City of Chicago,
(State)
in the County of Cook and (Province) of Illinois, am employed
by the above named company do hereby apply for membership
(Class 1) in the Association of Employees, Benefit Association, and agree
to be bound by the regulations of said Association, a copy of
which has been by me received, and to pay other contributions
of a full benefit Association Harvester Company and in force
of my membership.
I also agree, request and direct that said Company, or
its proper agents, and in the manner provided for in these
rules, shall, during the continuance of my employment, apply
as a voluntary contribution from my wages earned by me under
said contract, one and one-half (1 1/2) per cent of my wages,
for the purpose of securing the benefits provided in the
regulations for a member of Class 1 of said Association.

Unless I shall hereafter otherwise designate, in writing, with the approval of the Superintendent of the Benefit Association, death benefits shall be payable to my wife (husband), if I am married at the time of my death; or if I have no wife (husband) living, then to my children, collectively, each to be entitled to an equal share, including as entitled to parent's share the children of any dead child; or, if there be no children or children's children living, X then to my father and mother jointly, or to the survivor; or if neither be living, then to ----- if living, and if not living, then to my next of kin, payment in behalf of such next of kin to be made to my legal representative; or, if there be no such next of kin, or if proper claim is not made to the Superintendent within one year from the date of my death, the death benefit shall lapse, and the amount thereof shall become and remain a part of the Benefit Fund.

I also agree, for myself and those claiming through me, to be governed by the regulations providing for final and conclusive settlement of all claims for benefits, or controversies of whatever nature, by reference to the Superintendent of the Benefit Association, and an appeal from his decision to the Board of Trustees.

I also agree that any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, or any attempt on my part to defraud or impose upon said Benefit Association, or my resigning from or leaving the service of said International Harvester Company, International Harvester Company of America, or subsidiary Companies, or my being relieved or discharged therefrom, shall forfeit my membership in the said Benefit Association, and all rights, benefits and equities arising therefrom, except that such termination of my employment shall not (in the absence of any of the other foregoing causes of forfeiture) deprive me of any benefits to the payment of which I may be entitled by reason of disability beginning and reported before and continuing without interruption to and after such termination of my employment, nor of the right to continue my membership in respect of death benefit only, as provided in said rules.

I certify that I am correct and temperate in my habits; that so far as I know, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown in the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

In witness where, I have signed by name hereto at Chicago
(State)
in the County of Cook, (Province) of Illinois, this 13th day of April, A. D. 1925, the membership issued under this application to take effect on such date as may be designated by said Superintendent, if I be at work for the Company on that date. If not at work on that date, then on such future date as may be designated by said Superintendent, provided I pass a new medical examination, if the said Superintendent requires one.

WILLIE PRINCE

Signature of Applicant-Christian name in full
Witness H. H. Ruston

The foregoing application is approved at the office of the Superintendent of the Employees' Benefit Association, International Harvester Company, at Chicago, Illinois, this 16th

day of Apr., A. D. 1925; to take effect the 20th day of Apr., A. D. 1925.

F. E. CHAPMAN
Superintendent of Employees' Benefit Association"

The certificate issued on such membership, and upon which this suit is brought, is dated April 20th, 1925, and recites that "Willie Prince is a member of the Employees' Benefit Association, International Harvester Company, from above date, and in accordance with the rules and regulations thereof." The rules and regulations of the benefit association were received in evidence without objection. Rule 15 provides that "when a member resigns from or voluntarily quits the service of the company, his membership in the association shall terminate automatically and contemporaneously with the time of so resigning or voluntarily quitting the service." This rule also provides that "a member shall not thereafter, nor shall his beneficiaries in the event of his death, be entitled to benefits for disability, special or death benefits, unless disability or death shall be the result of sickness or injury beginning or occurring and reported by the member or by some person in his behalf to his Foreman, Time-keeper, immediate superior, or to the Medical Examiner of the association within three consecutive working days next following the date member last worked." Rule 38 provides that "claims for death benefits will not be allowed unless notification is given and report made as required in Sections 43 and 44, except in case where death is instantaneous or sudden and not preceded by disability. Claims for death benefits must be made within one year after the death of member." Rule 29 of the association provides that "a former member who has terminated his service, or beneficiaries of such member, shall be entitled to disability or death benefits, provided his disability is due to sickness or accident, or death resulting from such sickness or accident, as the case may be, beginning or occurring and reported

day of Jan., 1. 1905; in fact effect the said day of
Jan., 1. 1905.

L. E. (1905)

An statement of L. E. (1905) Association.

The certificate issued on each membership, and upon which this

is brought, is dated April 1905, and reads: "This

is a member of the L. E. (1905) Association, International

Harvester Company, from about 1905, and in connection with the

and registration thereof. The wife and registration of the

association was received in evidence without objection. This is

provided that when a member resigns from an association under the

terms of the company, his membership in the association shall

terminate automatically and not automatically with the day of no

resigning or voluntarily leaving the service. This wife also

provided that the member shall not thereafter, nor shall his

status in the event of his death, be entitled to benefits for dis-

ability, except in cases of death, or death disability or death shall

be the result of accident or injury resulting or occurring and resulting

by the member or by some person in his behalf or his

member, immediate relative, or to the member of the

from within three consecutive working days following the date

member last worked. This is provided that claims for death benefits

will not be allowed unless notification is given and return made as

required in sections 43 and 44, except in case where death is

instantaneous or sudden and not preceded by disability. Claims for

death benefits may be made within one year after the death of

member. This is of the association provides that a person who

who has terminated his service, or discontinuation of work contract, shall

be entitled to disability or death benefits, provided the disability

is due to accident or injury, or death resulting from such accident

or accident, as the case may be, resulting or occurring and resulting

and existing before the member terminated his employment while he was a member of the Association in good standing. This rule shall not be construed to prevent the beneficiaries from recovering death benefits where a member who has left the service has continued his membership in respect to death benefits only, as provided for in Section 15."

Allen Mitchell, a witness called on behalf of the plaintiff, testified to the effect that he knew Willie Prince in his lifetime, and that they were both employed by the International Harvester Company; that he saw Prince on July 13th, 1925, and that as far as the witness could see, Prince was in a normal condition and well; that he saw him on July 25th, 1925, and that Prince was well and healthy; that he heard a conversation between Prince and his foreman relative to Prince going on a leave of absence; that he heard Prince tell the foreman that he, Prince, wanted to go home on a vacation, and that the foreman told Prince that it would be better for him to be back in two weeks, if he wanted to keep his job; that the last time Prince worked was on July 13th; that on the Monday following July 13th, 1925, Mrs. Crommie, the plaintiff, told the witness to go to the International Harvester Company and turn in Prince's death certificate, which he, the witness, proceeded to do, and that the insurance claim agent of the company told the witness to make an insurance claim for Prince, who had been killed.

Matthew Jones, a witness for the plaintiff, testified that in July, 1925, he heard Prince ask for a pass to go to some part of Alabama on a furlough, and that the foreman told Prince that if he, Prince, should go, he should be back in two weeks; that this conversation occurred after July 4th, 1925.

It was stipulated that a notice of the death of Prince had been delivered to the defendant, as claimed by plaintiff.

and calling before the summer terminated his employment with the
 was a member of the association in good standing. This was well
 not be considered as having the beneficiaries from receiving death
 benefits where a person who had left the service has continued his
 membership in respect to death benefits only, as provided for in

Section 15.

Allen Mitchell, a witness called on behalf of the plaintiff,
 testified to the effect that he knew Willie Prince in his lifetime,
 and that they were both employed by the International Harvester
 Company; that he saw Prince on July 12th, 1935, and that he saw as
 the witness could tell, Prince was in a normal condition and well;
 that he saw him on July 13th, 1935, and that Prince was well and
 healthy; that he heard a conversation between Prince and his foreman
 relative to Prince going on a leave of absence; that he heard Prince
 tell the foreman that he, Prince, wanted to go home on a vacation,
 and that the foreman told Prince that it would be better for him to
 be back in two weeks, if he wanted to keep his job; that the last
 time Prince worked was on July 11th; that on the Friday following
 July 12th, 1935, Mrs. Emma, the plaintiff, said the witness to go
 to the International Harvester Company and learn in Prince's death
 certificate, which he, the witness, procured to do, and that the
 insurance officer of the company told the witness to write an
 insurance claim for Prince, who had been killed.

Esther Lewis, a witness for the plaintiff, testified that
 is July, 1935, he heard Prince ask for a pass to go to some part of
 Alaska on a trip; and that the foreman told Prince that it was
 Prince, should go, he would be back in two weeks; that this conver-
 sation occurred about July 12th, 1935.

It was stipulated that a notice of the death of Prince had
 been delivered to the defendant, as claimed by plaintiff.

Herbert Hable testified that he was timekeeper for the defendant in July, 1925, and that part of his duties as such timekeeper was to keep a record of the men working; that he did not personally recall Willie Prince. As a part of his examination, he was shown a part of the records of the association with reference to the employment of Prince. This instrument was received in evidence without objection, and on cross-examination of this witness by plaintiff's attorney, he stated that he did not remember definitely any conversation with Prince with reference to the termination of the employment of Prince by the International Harvester Company, but that from the record, he could state definitely that Prince told the witness that at the time he ceased working for the International Harvester Company, he, Prince, was quitting. As stated, this evidence was adduced by counsel for plaintiff on cross-examination.

At the close of the plaintiff's evidence, a motion was made to direct a verdict for the defendant. In passing upon this motion, the trial court stated, "You see, when he quit, he is out of it, except by paragraph 15. That keeps him in three days. *** I have no doubt about the evidence that he quit." A fair construction of Rule 15, already noted, upon which plaintiff apparently predicates her right to recover, that a "member shall not thereafter, nor shall be beneficiaries in the event of his death, be entitled to benefits for disability, special or death benefits, unless disability or death shall be the result of sickness or injury beginning or occurring and reported by the member or by some person in his behalf to his foreman, timekeeper, immediate superior, or to the medical examiner of the association, within three consecutive working days next following the date member last worked," together with all the other rules referred to, leads us to the conclusion that, unless a member of the association contracted a sickness, or

Report which testified that he was ill during the time-
 between in July, 1933, and last part of his duties as such time-
 keeper was to keep a record of the men working; that he did not
 personally recall Willie Brown. As a part of his examination, he
 was shown a part of the records of the association with reference
 to the employment of Brown. This document was received in evidence
 without objection, and on cross-examination of this witness by
 Plaintiff's attorney, he stated that he did not remember definitely
 any conversation with Brown with reference to the termination of
 the employment of Brown by the International Harvester Company.
 But that from the record, he could state definitely that Brown told
 the witness that at the time he ceased working for the International
 Harvester Company, he, Brown, was willing. As stated, this evidence
 was introduced by counsel for Plaintiff on cross-examination.

At the close of the Plaintiff's evidence, a motion was
 made to direct a verdict for the defendant. In passing upon this
 motion, the trial court stated, "You see, when he quit, he is out
 of it, except by agreement. That keeps him in three days. ***
 I have no doubt about the evidence that he quit." A fair conclu-
 sion of what is, already stated, which Plaintiff strenuously
 proffered her right to recover, that a member could not thereafter
 nor shall be re-admitted in the event of his death, he testified
 to benefits for disability, funeral or death benefits, unless
 disability or death shall be the result of sickness or injury
 beginning or occurring and reported by the member or by some person
 in his behalf to the foreman, timekeeper, immediate superior, or to
 the medical examiner of the association, within three consecutive
 working days next following the date member last worked, together
 with all the other rules referred to, I submit to you the conclusion
 that, unless a member of the association contracted a sickness, or

was injured while in the employ of the defendant company, or was still in the employ of the company at the time of meeting his death in the manner that death came to Prince, the beneficiaries under the certificate cannot recover.

The application for membership in the Employes' Benefit Association of the International Harvester Company, the certificate issued and the rules applicable thereto, are definitely passed upon in Przybylski v. International Harvester Co., 187 Ill. App. 235. The published reports contain only an abstract of the opinion. An examination of the opinion discloses that the member left the service and employment of the defendant on January 30th, 1911, and died April 2nd, 1911. In the opinion, it is recited that "the contract of membership consisted of the application for membership, the certificate of membership and the rules and regulations of the association. Benes v. Knights and Ladies of Honor, 231 Ill. 134. *** Referring, then, to the terms of the application, it is clearly stated that membership in the association shall cease upon the termination of employment with the defendant company, but that such termination shall not deprive the member of any benefits to which he may be entitled by reason of disability beginning and reported before and continuing without interruption to and after such termination of employment, nor of the right to continue membership in respect of death benefits only as provided in said rules. This right to death benefits, last referred to, appears in the latter part of Rule 15, above quoted, where it is provided that a member who has been in the service five years, even though he should leave the service, may continue his membership under certain conditions. It is not claimed that deceased comes within this provision." From the statement of the court in that case, it appears that Przybylski

was injured while in the employ of the defendant company, and
will in the employ of the company at the time of meeting the board
in the manner that should have been followed, the defendant must
the certificate cannot recover.

The application for membership in the defendant's benefit
association of the International Newspaper Guild, the certificate
issued was the only certificate thereto, and defendant issued upon
in International v. Newspaper Guild, 187 Ill. App. 338.
The defendant's certificate contain only in respect of the opinion. In
examination of the opinion discloses that the record left the
service and employment of the defendant on January 30th, 1911, and
died April 2nd, 1911. In the opinion, it is recited that the
contract of membership consisted of the terms for membership,
the certificate of membership and the rules and regulations of the
association. International v. Newspaper Guild, 187 Ill. App. 338.
Further, then, to the terms of the application, it is clearly
stated that membership in the association shall issue upon the
completion of employment with the defendant company, but that such
completion shall not deprive the member of any benefits to which
he may be entitled by reason of disability beginning and reported
before and continuing without interruption to and after such termina-
tion of employment, nor of the right to continue membership in
respect of death benefits only as provided in its rules. This
right to death benefits, last recited to, appears in the latter part
of this 12, above quoted, where it is recited that a member who
has been in the service five years, even though he should leave the
service, may continue his membership under certain conditions. It
is not claimed that defendant acted within this provision. The
that statement of the board in this case, it appears that defendant

was voluntarily absent from work from January 22nd to January 26th, 1911, inclusive. After various conversations with a foreman of defendant company, it was arranged that he should return to work on January 27th, which he did, and continued in a rather desultory way. On January 31st, 1911, he did not appear at all, and he was dropped from the payroll, and a "termination of service notice" was made upon him. In its opinion, the court said:

"It is not claimed that any notice, report or information of any sickness or disability of Przybylski was given to defendant before January 31, 1911, and no notice or report or information of any kind as to his health was given to the timekeeper or medical examiner or anyone officially connected with the association at any time. He beyond doubt left the service and absented himself without notice, and under the provisions of Rule 15 his membership in the association terminated on January 31, 1911.

Counsel for plaintiff seek to avoid the obvious effect of Rule 15, by arguing that it must be shown that the leaving or absenting himself from service was 'absolutely voluntary,' that is, if we understand rightly, not induced through any sickness from which deceased might be suffering. This contention is met by the provision in Rule 15, that under such circumstances an employ may afterwards give reasons satisfactory to the superintendent for leaving or absenting himself without notice."

The conclusion of the court in that case was that, because the insured had definitely ceased his employment with the company before and at the time of his death, no claim could be predicated upon his death.

While the record of the company in the instant case, which is not disputed, shows that Prince had left the employ of the International Harvester Company, two witnesses, produced by the plaintiff, testified that he had received from his foreman a two weeks' leave of absence shortly before he left. Therefore, the question as to whether he had left its employ at the time of his death, was a question of fact which the jury should have been allowed to pass upon. We are of the opinion that the court was in error in directing a verdict for the plaintiff. Therefore, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

was voluntarily absent from work from January 1931 to January 1932.
Hill, inclusive. After various conversations with a former co-
defendant company, it was arranged that he should return to work on
January 1931, which he did, and remained in a rather satisfactory way.
On January 1931, Hill, he did not appear at all, and he was dropped
from the payroll, and a "termination of service notice" was made
from him. In the opinion, the court said:

"It is not claimed that any notice, verbal or written,
of any change or discontinuance of employment was given
to defendant before January 21, 1931, and no notice or report
or indication of any kind as to his having been given to
the employer or related in any way or anyone officially
connected with the school at any time. No report or
notice was given to the school at any time. The school
under the provisions of the law is not responsible in the school-
tion terminated on January 21, 1931.
General law should be used to avoid the obvious effect
of such a law, by stating that it was known that the law
or voluntarily from service was 'voluntarily voluntary'.
That is, it was known that the law was intended through any
person, from which person it was intended. This
intention is not by the provision in the law, that under such
circumstances of law, any attorney, law person or the
school to the defendant not leaving an existing law-
self without notice."

The conclusion of the court in that case was that, because the law
had definitely ceased his employment and the company before and at
the time of his death, no claim could be established under the law.
All the facts of the company in the instant case, which
is not disputed, show that notice had been given to the labor-
union, two witnesses, produced by the plaintiff,
testified that he had received from his former employer, notice of
discharge shortly before he died. Therefore, the question as to whether
he had left the company at the time of his death, was a question of
fact which the jury should have been allowed to decide. As the
the opinion that the court was in error in refusing a verdict for
the plaintiff. Therefore, the judgment is reversed and the cause
remanded for a new trial.

37686

BENJAMIN S. MESIROW,

(Plaintiff) Appellant,

v.

SIEBEL INSTITUTE OF TECHNOLOGY,
INC., et al.,

(Defendants) Appellees,

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

231 I.A. 604⁵

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County entered on June 8th, 1934, denying the petition of plaintiff for writ of mandamus commanding defendant to admit petitioner in person or by attorney or agent to the principal office of the company for the purpose of making an examination of the books and records of account of the defendant company, and to allow petitioner, his attorney or agent, to enter the principal office of the company at all reasonable times from day to day for the purpose of completing the examination of the financial condition of the company.

The petition recites inter alia that on June 3rd, 1933, petitioner became the owner of 112 shares of the common stock of defendant company, the ownership of which was duly recorded in the books and records of the company, and evidenced by the company certificate; that the petitioner, desiring to examine the books and records of the company to determine the status of his investment, did on March 2nd, 1934, request such an examination for that purpose, and appointed a certified public accountant as his agent to examine such books and records, and that the defendant refused to permit petitioner by his agent to examine the affairs of the corporation; that the petitioner on April 3rd, 1934, again made a request of the president of the company that he have leave to examine the books of the corporation. Defendant and its officers filed an answer to this petition, in which they admit that petitioner is the owner of 112 shares of

BERNARD A. BARNES

(Plaintiff) Defendant

v.

SIBER INSTITUTE OF TECHNOLOGY

190, 22 St.

(Defendants) Petitioner

COOK COUNTY

COOK COUNTY

201 I.A. 604

Opinion filed June 26, 1935

MR. JUSTICE BARNES delivered the opinion of the court.

This is an appeal from an order of the Circuit Court of Cook County entered on June 24, 1934, denying the petition of plaintiff for writ of mandamus compelling defendant to permit petitioner in person or by attorney or agent to the principal office of the company for the purpose of making an examination of the books and records of account of the defendant company, and to allow petitioner, his attorney or agent, to enter the principal office of the company at all reasonable times from day to day for the purpose of completing the examination of the financial condition of the company.

The petition recites inter alia that on June 24, 1934,

petitioner became the owner of 111 shares of the common stock of defendant company, the ownership of which was duly recorded in the books and records of the company, and evidenced by the company certificate; that the petitioner, desiring to examine the books and records of the company to determine the status of his investment, did on March 2nd, 1934, request such an examination for that purpose, and appointed a certified public accountant as his agent to examine such books and records, and that the defendant refused to permit petitioner by his agent to examine the records of the corporation; that the petitioner on April 27, 1934, again made a request of the president of the company that he have leave to examine the books of the corporation. Defendant and its officers filed in answer to said petition, in which they admit that petitioner is the owner of 111 shares of

common stock of the corporation, and state upon information and belief, that petitioner did not desire to examine the books and records of the defendant corporation to determine the status of his investment, but on the contrary, they state upon such information and belief that petitioner's purpose in seeking to examine the books was improper, and was for purposes detrimental to the best interests of the corporation.

"An Act to revise the law in relation to corporations for pecuniary profits", approved June 13th, 1933, (Cahill's Illinois Revised Statutes 1933, Chap. 32, Sec. 45), provides that:

"Each corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its shareholders and board of directors; and shall keep at its registered office or principal place of business in this State, or at the office of a transfer agent or registrar in this State, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each. Any person who shall have been a shareholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes and record of shareholders, and to make extracts therefrom."

This statute indicates that the purpose of the enactment of the General Assembly is to permit any stockholder of a corporation, under the conditions recited, to examine the books and records, but only for a proper purpose.

We are of the opinion that when defendant denied by its answer, on information and belief, that plaintiff desired to make such examination of the books of the corporation for a proper purpose, that an issue of fact was thereby created, and that the burden was cast upon the plaintiff to show that the purpose of such examination was a proper one. The trial court seems to have taken this position, and upon this question, the court heard the evidence of various witnesses.

common stock of the corporation, and state upon information and belief, that petitioner did not desire to examine the books and records of the defendant corporation to determine the state of its investment, but on the contrary, they state upon such information and belief that petitioner's purpose in seeking to examine the books and records, and was for purposes detrimental to the best interests of the corporation.

"An Act to revise the law in relation to corporations for security purposes", approved June 15th, 1935, (Illinois revised statutes 1935, Chap. 35, Sec. 45), provides that:

"Each corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its shareholders and board of directors; and shall keep at its registered office or principal office of business in this State, or at the office of a transfer agent or registrar in this State, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each. Any person who shall have been a shareholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, the books and records of account, minutes and record of shareholders, and to make extracts therefrom."

This statute indicates that the purpose of the enactment of the General Assembly is to permit any stockholder of a corporation, under the conditions recited, to examine the books and records, not only for a proper purpose.

We are of the opinion that when defendant denied by its answer, on information and belief, that plaintiff desired to make such examination of the books of the corporation for a proper purpose, that an issue of fact was thereby created, and that the burden was cast upon the plaintiff to show that the purpose of such examination was a proper one. The trial court would be bound upon this position, and upon this question, the court heard the evidence of various witnesses.

The plaintiff, Benjamin S. Mesirov, testified that he is an attorney-at-law; that he is the holder of 112 shares of stock of the defendant company, which he had owned for over six months; that he requested an examination of the books of the company through an agent, armed with a written request to the officials of the corporation; that these officials would not permit his agent to examine the books and records; that plaintiff was advised by his agent that access and examination of the books was refused because of the inability of the president of the corporation to be present at such time, as such president was to leave the city for an extended period, and that no examination would be permitted in his absence; that the purpose of the plaintiff in requesting such an examination was to ascertain the financial status of the corporation; that the only time he had any contact with the officers was at their last annual meeting, at which time he was not permitted to take down the names of the stockholders during the roll call; that he stated to the officers that he intended to make an examination of the books. He further testified that he had a statement of the condition of the company made about two years prior to the time of the trial, and that it did not look as though the company was doing very well; that at the annual meeting there was a rather hurried reading of figures of the report of the preceding year, which he could not remember; that he desired to ascertain what had become of the profits of other companies who were affiliates of the defendant company, as to whether or not these affiliates were paying any portion of the expenses of the defendant corporation, whether there were any profits diverted from the business, and whether the assets of the corporation were used for others.

On cross-examination, the plaintiff testified in substance that he bought the stock which he held from a Mrs. Stillman; that

The plaintiff, Benjamin A. Smith, testified that he is an attorney-at-law; that he is the holder of the stock of the defendant company, which he has owned for over six months; that he requested an examination of the books of the company through an agent, armed with a written request to the officials of the corporation; that these officials would not permit his agent to examine the books and records; that plaintiff was advised by his agent that access and examination of the books was refused because of the inability of the president of the corporation to be present at such time, as such president was to leave the city for an extended period, and that no examination would be permitted in his absence; that the purpose of the plaintiff as represented with an examination was to ascertain the financial status of the corporation; that the only time he had any contact with the officials was on their last annual meeting, at which time he was not permitted to take down the names of the stockholders during the roll call; that he stated to the officials that he intended to take an examination of the books. He further testified that he had a statement of the condition of the company made about two years prior to the time of the trial, and that it did not look as though the company was doing very well; that at the annual meeting there was a further hurried reading of figures of the report of the preceding year, which he would not remember; that he desired to ascertain what had become of the profits of other companies and was utilized of the defendant company, as he wanted to get these affidavits made before the meeting of the expenses of the defendant corporation, whether there were any profits derived from the company, and perhaps the assets of the corporation were used for other.

On cross-examination, the plaintiff testified in substance that he bought the stock which he held from a Mr. Williams; that

one E. A. Siebel sent Mrs. Stillman to the witness; that E. A. Siebel is a chemical engineer and devises formulas for manufacturers of beer, and supervises the labeling, bottling and marketing of beer; that the witness has frequently acted as attorney for E. A. Siebel & Company, and has attended to many important matters for them; that he advised with E. A. Siebel after he had been offered the stock; that the witness had formerly advised Mrs. Stillman not to take the sum of \$1,600.00, which she said she had been offered for her stock; that after Mrs. Stillman had offered to sell the stock to plaintiff, he had an examination made of the books of defendant corporation; that afterwards he paid her \$1,600.00 for it; that he held that amount of money belonging to E. A. Siebel when he made the purchase; that by a former audit which had been made of the books of the defendant company, he found that the stock was worthless, but that notwithstanding, he advised Mrs. Stillman not to sell her stock for \$1,600.00 to the person formerly making that offer to her. This witness testified further that E. A. Siebel, during the year 1933, had paid him quite a substantial sum of money amounting to approximately \$2,500.00, but that it was not given to him to purchase this stock, and that when he bought the stock in 1933 he had no idea as to its value.

It is shown that after Mrs. Stillman called upon plaintiff with reference to the sale of this stock, he was actively engaged in investigating the affairs of this corporation; that he had had considerable correspondence with the Secretary of State with regard to defendant company; that he charged Mrs. Stillman no fees for his work, but that after "beer came back", he then voluntarily purchased the stock. It is further shown that his client, E. A. Siebel, a brother of the defendant, is engaged in a business similar to that of the defendant corporation.

one E. A. Michael and the witness; that E. A. Michael is a chemical engineer and devised formulas for manufacturing of paint and supervises the labeling, bottling, and marketing of paint; that the witness has frequently acted as attorney for E. A. Michael & Company, and has attended to many important matters for them; that he advised with E. A. Michael after he had been offered the stock; that the witness had formerly advised Mrs. Williams not to take the sum of \$1,000.00, which she said she had been offered for her stock; that after Mrs. Williams had offered to sell the stock to plaintiff, he had an examination made of the books of defendant corporation; that afterwards he said that \$1,000.00 for it; that he said that amount of money belonging to E. A. Michael when he sold the stock; that by a former audit which had been made of the books of the defendant company, he found that the stock was worthless, but that notwithstanding, he advised Mrs. Williams not to sell her stock for \$1,000.00 to the reason formerly made good after to her. This witness testified further that E. A. Michael, during the year 1935, had paid him quite a substantial sum of money amounting to approximately \$2,000.00, but that it was not given to him for purchase this stock, and that when he bought the stock in 1935 he had no idea as to its value. It is shown that after Mrs. Williams called upon plaintiff with reference to the sale of this stock, he was actively engaged in investigating the affairs of this corporation; that he had had considerable correspondence with the Secretary of State with regard to defendant company; that he advised Mrs. Williams not to sell her stock but that after "these checks", he then voluntarily purchased the stock. It is further shown that his client, E. A. Michael, a majority of the defendant, is engaged in a business similar to that of the defendant corporation.

Fred P. Seibel, Sr., president of defendant company, testified that in the year 1932, Mrs. Stillman, whose husband had formerly been employed by defendant, and who had acquired the stock in question during such employment, came to the witness and asked him to purchase this stock; that she demanded \$2,000.00 for it; that he told her he would give her \$1,000.00 down and \$1,000.00 in three or four months; that he heard nothing further from her concerning the stock until he was notified by the plaintiff that plaintiff owned the stock; that prior to that time in the year 1932, he had received a notice from plaintiff that he, plaintiff, was the attorney for Mrs. Stillman, and that thereafter, upon the request of plaintiff, an examination was made by auditors of plaintiff of the books of defendant corporation; that the next thing he heard about the stock was when he was requested to transfer it to the name of the plaintiff; that he heard nothing further about it until the year 1933.

It is our opinion that the plaintiff has not complied with the requirements of the statute by making a showing to the court that his purpose in seeking an examination of the books of the defendant corporation was for a proper purpose. On the contrary, after considering all the testimony, including that of plaintiff, we conclude that in acquiring this stock, plaintiff did so for the benefit of E. A. Seibel, his client, a competitor of defendant. Therefore, the judgment of the Circuit Court of Cook County denying the writ of mandamus, is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

of the Circuit Court of Cook County during the trial of defendant,
his office as a member of the Board of Directors, the judgment
that in securing this stock, Plaintiff did so for the purpose of
considering all the testimony, including that of Plaintiff, as correct
and correct him for a proper purpose. On the contrary, after
that his purpose in seeking an examination of the books of the defendant-
the requirements of the statute by causing a subpoena to the court
it is our opinion that the Plaintiff has not complied with
nothing further than it until the year 1937.
requested to transfer it to the name of the Plaintiff; that he never
tion; that the next thing he heard about the stock was when he was
was made by matters of Plaintiff of the books at defendant's company-
and that thereafter, upon the request of Plaintiff, an examination
from Plaintiff that he, Plaintiff, was the attorney for Mrs. William
that prior to that time in the year 1937, he had received a notice
until he was notified by the Plaintiff that Plaintiff owned the stock;
months; that he heard nothing further from her concerning the stock
may he would give her \$1,000.00 down and \$1,000.00 in three or four
purchase this stock; that she demanded \$1,000.00 for it; that he told
tied that in the year 1937, Mrs. William, being husband and jointly
Fred L. Seidel, Jr., President of defendant company, testified

37703

EDITH BENJAMIN,

Plaintiff-Appellee,

v.

LOUIS E. EMERMAN & COMPANY, a
corporation,

Defendant- Appellant.

187
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

281 I.A. 6051

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered on May 20th, 1934, in the Circuit Court of Cook County, for the sum of \$862.60, in an action in trover brought against it by plaintiff.

The declaration filed in the cause on April 14th, 1934, alleges inter alia that plaintiff was lawfully possessed of, as her own property, a No. 7 Ryerson-Kling punch of the value of \$2,500.00, which she, on March 3rd, 1931, casually lost out of her possession, and that on the same day, it came into the possession of the defendant by finding, and that defendant, well knowing the goods and chattels to be the property of plaintiff, although often requested to so do, has not delivered the same to the plaintiff, and that on to-wit: March 3rd, 1931, converted and disposed of the property to his own use. To the declaration, a plea of the general issue was filed. The plaintiff was not called as a witness.

One Abraham Netchin, a witness for plaintiff, testified that he bought the machine in question, in February, 1925. The record shows that the property was sold to the plaintiff under a mortgage foreclosure sale against the Netchin Steel Construction Company in the year 1930 or 1931. How the Netchin Steel Construction Company acquired title from Abraham Netchin, does not appear in the record. Netchin further testified to the effect that in the latter part of 1930, or early in 1931, he had conversations with a Mr. Emerman of

JOHN B. BROWN

Plaintiff-Appellee

v.

JOHN E. BROWN & COMPANY,
Corporation

Defendant-Appellee

JOHN B. BROWN

Plaintiff

JOHN B. BROWN

2001 A.A. 605

Opinion filed June 26, 1935

MR. JUSTICE BROWN delivered the opinion of the court.

This is an appeal by defendant from a judgment entered on May 20th, 1934, in the Circuit Court of Cook County, for the sum of \$887.00, in an action to recover amount claimed as by plaintiff. The decision filed in the case on April 14th, 1934,

affirmed the judgment of the Circuit Court, and the plaintiff, as her own property, a lot of 1.75 acres, being a part of the same, which she, on March 2nd, 1931, conveyed to her husband, and that on the same day, it came into the possession of the defendant.

and by finding, that defendant, well knowing the facts and circumstances to be the property of plaintiff, although other transactions to so do, had not delivered the same to the plaintiff, and that on to-wit: March 2nd, 1931, conveyed and disposed of the property to his own use. To the objection, a plea of the general issue was filed. The plaintiff was not called as a witness.

JOHN B. BROWN, a witness for plaintiff, testified that he bought the mortgage in question, in February, 1931. The record shows that the property was sold to the plaintiff under a mortgage to-wit: March 2nd, 1931, and that the same was conveyed to the plaintiff in the year 1930 or 1931. How the defendant could have obtained the title from the plaintiff, does not appear in the record. The record further testified that the plaintiff had in the latter part of 1930, or early in 1931, had conversations with a Mr. [Name] of

defendant company, relative to this Ryerson-Kling Punch press; that the property was then in the hands of the witness; that it was necessary for his company which occupied certain premises, to vacate, and that the witness told Emerman that the machine had to be sold. This witness further testified to the effect that he held the machine for Edith Benjamin, and that Edith Benjamin authorized him to sell it; that Emerman declined to buy the machine, but suggested that it be sent out to his plant for the purpose of sale, and that he, Emerman, would handle the transaction on a 10% commission basis; that the machine was thereafter delivered to Emerman by Netchin, and that at the time of the delivery, there was stenciled on the machine the following: "Edith Benjamin, Lessor, Cicero Manufacturing Company, Lessee."

Over the objection of defendant's counsel, this witness was allowed to testify that the plaintiff was the owner of the machine at the time of the delivery. The machine was sold by Emerman to the Inland Steel Company for \$1,025.00. There seems to be no question but that the property was delivered to the defendant by Netchin as agent for defendant, for the purpose of having it sold, and that defendant did sell it. At the time of the sale, the record indicates that defendant claimed that Netchin was indebted to the defendant company in a considerable amount, and that a controversy arose between defendant and Netchin as to whether or not the money derived from the sale of this machine should be applied by defendant to the payment of the account owed to it by Netchin. Witnesses for defendant denied that when the machine was delivered to defendant, plaintiff's name was on it, or that there was anything said or done to indicate that plaintiff was its owner. Presuming, however, that the machine in question was the property of the plaintiff, and that

defendant company, relative to this present-day, which was; that
the property was then in the hands of the witness; that it was
necessary for his company which required certain goods, to provide
and that the witness sold certain goods to the witness and to be sold.
This witness further testified to the effect that he sold the machine
for Edith Benjamin, and that Edith Benjamin authorized him to sell it;
that Benjamin declined to buy the machine, but suggested that it be
sent out to his plant for the purpose of sale, and that he, Benjamin,
would handle the transaction on a 10% commission basis; that the
machine was thereafter delivered to Benjamin by witness, and that at
the time of the delivery, there was stipulated on the machine the
following: "Edith Benjamin, Lessee, 11200 West 42nd Street, New York,
N.Y." Over the objection of defendant's counsel, this witness
was allowed to testify that the machine was the property of the
machine at the time of the delivery. The machine was sold by Benjamin
to the Infant Steel Company for \$1,000.00. There seems to be no
question but that the property was delivered to the defendant by
witness at the time of the delivery, and the witness of being it sold, and
that before the sale, at the time of the sale, the record
indicates that defendant claimed that Benjamin was indebted to the
defendant company in a considerable amount, and that a controversy
existed between defendant and Benjamin as to whether or not the money de-
rived from the sale of this machine should be applied by Benjamin to
the payment of the account owed to it by Benjamin. Witness for
defendant denied that once the machine was delivered to defendant,
plaintiff's name was on it, or that there was anything said or done
to indicate that plaintiff was its owner. However, that
the machine in question was the property of the plaintiff, and that

defendant had notice thereof, still, from the evidence before us, we can arrive at no other conclusion, but that she authorized the sale, that there was no conversion of the property in question, that if she has any action against defendant, it is for the money derived from the sale, and that she cannot maintain an action in trover for its wrongful conversion. Therefore, the judgment is reversed.

REVERSED.

HEBEL, P.J. AND WILSON, J. CONCUR.

defendant had notice thereof, still, from the evidence before us, we can arrive at no other conclusion, but that she received the sale, that there was no conversion of the property in question, that if she has any action against defendant, it is for the money derived from the sale, and that she cannot maintain an action in trover for the wrongful conversion. Therefore, the judgment is reversed.

REVERSED.

WHEELER, J. and WHEELER, J. dissent.

37712

AARON MILLER,

(Plaintiff) Appellee,

v.

KLING BROS. & CO. INC., a
Corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

281 I.A. 605²

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant corporation from a judgment against it for \$4,200.00, entered on April 14th, 1934. The action is for an alleged balance of salary due from defendant to plaintiff for the year beginning January 1st, 1927. The trial was by jury, and it was upon the verdict of the jury that the judgment was entered.

The amended declaration of plaintiff, upon which the hearing was had, recites generally that plaintiff was employed in January, 1910, by defendant, Kling Bros. & Co., a co-partnership, and afterwards from March 6th, 1911, by Kling Bros. & Co., Inc., a corporation, successors to Kling Bros. & Co., upon a stated salary, and that in addition to the salary, he was paid certain commissions; that his salary was fixed at \$7,200.00 per year, plus certain commissions on sales, and that the employment on such basis continued until January 1st, 1927; "that the defendant on the 1st day of January, 1927, employed the plaintiff as buyer for the year 1927 at a yearly salary of \$7,200.00, and that plaintiff, in consideration of such salary, entered into the services of the defendant on, to-wit: the 1st day of January, 1927, and continued therein until the 1st day of May, 1927, when the defendant wrongfully discharged the plaintiff from its employ, and that by reason of such wrongful discharge, defendant became liable to pay plaintiff the full amount of salary promised to be paid for the full period of one year, and there is now due plaintiff from defendant a large sum of money, to-wit: \$4,200.00."

James H. Hines

(Plaintiff) vs. Defendant

v.

James H. Hines, Defendant

(Defendant) vs. Plaintiff

Supreme Court

Case No. 100-100000

100-100000

Opinion filed June 28, 1935

MR. JUSTICE HALL, delivered the opinion of the court.

This is an appeal by defendant corporation from a judgment against it for \$1,000.00, entered on April 14th, 1934. The action is for an alleged balance of salary due from defendant to plaintiff for the year beginning January 1st, 1933. The trial was by jury, and it was upon the verdict of the jury that the judgment was entered. The averred facts of the case are as follows: When the plaintiff was last, twelve months before plaintiff was employed in January, 1933, by defendant, King Bros. & Co., a corporation, and afterwards from March 24th, 1931, by King Bros. & Co., Inc., a corporation, successor to King Bros. & Co., upon a stated salary, and that in addition to the salary, he was paid certain commissions; that his salary was fixed at \$7,000.00 per year, plus certain commissions on sales, and that the employment on such basis continued until January 1st, 1933; that the defendant on the last day of January, 1933, employed the plaintiff as buyer for the year 1933 at a yearly salary of \$7,000.00, and that plaintiff, in consideration of such salary, entered into the contract of the defendant on January 1st, 1933, and continued therein until the last day of January, 1934, when the defendant wrongfully discharged the plaintiff from its employ, and that by reason of such wrongful discharge, defendant became liable to pay plaintiff the full amount of salary provided to be paid for the full period of one year, and there is now due plaintiff from defendant a large sum of money, to-wit: \$4,000.00.

It is the claim of defendant that plaintiff's employment for the year 1927 and prior thereto for a number of years, in so far as his stated salary was concerned, was on a month to month and not on a yearly basis, and that it had the right to discharge plaintiff at any time upon paying him the salary due him until the time of his discharge. Plaintiff was discharged in May, 1927, and his claim is for the last seven months of the year at the rate of \$800.00 per month, or \$4,200.00.

Plaintiff testified that, "at the beginning of the year 1927, I had a talk with Mr. Kling, who told me he would pay me \$7,200.00 for that year as buyer, but would be unable to pay me the commissions I had received in the past to manage the departments. I objected to the cut in commissions, but I finally agreed to go along on that basis. About that time I received a statement from Kling Bros. & Co. with reference to my 1926 commissions. He further testified that Kling said, 'I will pay you \$7,200.00, as buyer for this year.'" Miller also testified that from the beginning of his employment by defendant, the agreement for salary was made on a yearly contract basis, and that in addition, he was paid commissions on sales.

Kling, the president of the defendant corporation, testified that "In September, 1926, Mr. Miller was still drawing 1%, which he was getting in addition to his salary. It was one arrangement. Whatever arrangement I had with him in September, 1926, and prior thereto was changed from January 1st, (1927) as to cutting out commissions. That was the only change that was made." Kling also testified in substance that plaintiff did not originally begin his course of employment with defendant in January, and that they started the arrangement as far as his salary was concerned on a monthly basis commencing on January 1st, because that was their inventory time, that at no time during his employment was he on a yearly

It is the claim of defendant that plaintiff's employment for the year 1937 was broken up into a number of years, as he for as his stated salary was concerned, was on a month to month basis and not on a yearly basis, and that it was the right to discharge plaintiff at any time upon paying him the salary due him until the time of his discharge. Plaintiff was discharged in May, 1937, and his claim is for the last seven months of the year at the rate of \$200.00 per month, or \$1,400.00.

Plaintiff testified that, at the beginning of the year 1937, I had a talk with Mr. Miller, who told me he would pay me \$1,400.00 for that year as bonus, but would be unable to pay me the commissions I had received in the past to arrange the department. I objected to the one in commission, but I finally agreed to go along on that basis. About that time I received a statement from Miller dated 6-25-37 with reference to my 1937 commissions. He further testified that Miller said, 'I will pay you \$1,400.00 as bonus for this year.' Miller also testified that from the beginning of his employment up to defendant, the agreement for salary was made on a yearly contract basis, and that in addition, he was paid commissions on sales.

Miller, the president of the defendant corporation, testified that in September, 1936, Mr. Miller was still traveling in which he was acting in addition to his salary. It was the arrangement. Plaintiff's agreement I had with him in September, 1936, and prior thereto was changed from January 1st, 1937, as he was making only commissions. That was the only salary that was made. Miller also testified in substance that plaintiff did not originally begin his course of employment with defendant in January, and that they started the employment as far as his salary was concerned on a monthly basis commencing on January 1st, because that was their customary time, that at the time during his employment was he on a yearly

salary basis, but was always on a monthly basis. Statements of commissions earned by plaintiff of years prior to 1927 were received in evidence. As to these, Kling testified that the statements for commissions were made out and paid at the end of the year because they could not be made up until that time, and that they never settled with him for commissions until the end of the year; that their course of business was to sell goods during January, February, March, April and May of each year for fall delivery. Kling further testified that in the month of September, 1926, a meeting was held at which the plaintiff, together with certain other persons interested in the corporation including the witness, were present, and that he, Kling, stated to those present that if the firm was to continue in business after the first of January, 1927, they would have to rearrange the overhead and all of them take less salaries, which was agreed to. It was at this meeting that plaintiff agreed to accept a salary and no commission. Kling further testified that some time in February, 1927, another meeting was held by the executives of the corporation, at which meeting the plaintiff was present, and that the witness stated to the plaintiff and the others present that the firm could not remain in business, because it was running at a loss, that they would have to liquidate the institution, and that their salaries would stop about May 1st, following, but that they paid the plaintiff up until June 1st; that after an effort had been made to sell the firm's merchandise to jobbers in the early part of March, 1927, its entire stock was sold at auction.

Plaintiff offered, and there was received in evidence, certain statements prepared by defendant and given to plaintiff showing commissions earned by plaintiff for various years prior to 1927, and subsequent to March 6th, 1911. At the close of all the evidence, a motion was made by defendant to strike the evidence relating to plaintiff's employment prior to 1927, which motion was denied. It is

salary basis, but was always on a monthly basis. The amount of
 commissions earned by Plaintiff 12 years prior to 1937 were recorded
 in evidence. As to these, King testified that the statements for
 commissions were made not only at the end of the year because
 they could not be made up until that time, and that they never reached
 with him for commissions until the end of the year; that their course
 of business was to sell goods during January, February, March, April
 and May of each year for full delivery. King further testified that
 in the month of September, 1936, a meeting was held at which the
 Plaintiff, together with certain other persons interested in the
 corporation including the witness, were present, and that he, King,
 stated to those present that if the firm was to continue in business
 after the first of January, 1937, they would have to reorganize the
 corporation and all of them take less salaries, which was agreed to.
 It was at this meeting that Plaintiff agreed to accept a salary and
 no commissions. King further testified that some time in February,
 1937, another meeting was held by the executives of the corporation, at
 which meeting the Plaintiff was present, and that the witness was not
 to the Plaintiff and the other present that the firm could not remain
 in business, because it was running at a loss, that they would have to
 liquidate the corporation, and that their salaries would stop about
 May 1st, following, but that they paid the Plaintiff up until June 1st;
 that after an effort had been made to sell the firm's merchandise to
 jobs in the early part of March, 1937, the selling stock was sold
 at auction.
 Plaintiff offered, and there was evidence in evidence,
 certain statements prepared by defendant and given to Plaintiff showing
 commissions earned by Plaintiff for various years prior to 1937, and
 subsequent to March 2nd, 1937. As the issue of all the evidence
 taken was made of defendant to show the evidence relating to Plaintiff's
 title defendant prior to 1937, which action was denied, it is

insisted by defendant that because the plaintiff is not suing on a contract made prior to the year 1927 and renewed for that year, but upon a new contract alleged to have been made for that year, that any evidence as to the terms of his former employment, or as to any commissions or salary received prior to that time, was immaterial and incompetent, and should not have been submitted to the jury; that evidence as to the terms of one contract is not admissible as tending to prove the terms of a subsequent contract sued on.

Defendant's contention that any evidence tending to show that the terms of plaintiff's employment by defendant prior to 1927 was immaterial and incompetent, and should not have been submitted to the jury, because the contract for the year 1927 was a separate and distinct contract, and the cases cited in support of such contention, might have some force, if it were not for the testimony of Kling, the president of the defendant company, to the effect that the arrangement made by defendant with plaintiff in September, 1926, was only a change from his prior contract in that by the contract for 1927, plaintiff was to be paid no commissions. The statements showing the amount of commissions paid to plaintiff prior to the making of the contract for the year 1927 show that settlements for his commissions were made yearly and at the end of each year. It is also indicated that the contract for the commissions in each instance were made at the same time as the contracts for his salary. We are of the opinion that the court was not in error in admitting the statements showing the payment of commissions. At the meeting held in September, 1926, plaintiff, after demurring, agreed to accept a salary, as he says, for the entire year 1927, and to waive his commissions. The agreement for a certain salary for the year might well have been the impelling motive which caused him to waive the commissions. However, the question as to whether the oral contract

insisted by defendant that because the plaintiff is not suing on a contract made prior to the year 1937 and because the contract was made after a new contract alleged to have been made for that year, 1937, any evidence as to the terms of his former employment, or as to any obligations or salary received prior to that time, was inadmissible and incompetent, and should not be taken admitted to the jury; that evidence as to the terms of any contract is not admissible as tending to prove the terms of a subsequent contract and was defendant's contention that any evidence tending to show that the terms of plaintiff's employment by defendant prior to 1937 was inadmissible and incompetent, and should not have been admitted to the jury, because the contract for the year 1937 was a separate and distinct contract, and the same cited in support of each contention, might have some force, it is not one of the decisions of this court, and defendant's contention is that the effect of the arrangement made by defendant with plaintiff in September, 1936, was only to change from his prior contract in that by the contract for 1937, plaintiff was to be paid no commission. The statements regarding the amount of commissions paid to plaintiff prior to the expiration of the contract for the year 1937 show that commissions for his commissions were made yearly and at the end of each year. It is also indicated that the contract for the commissions in each instance were made at the time as the contract for his salary. It is of the opinion that the court was not in error in admitting the statements regarding the payment of commissions. It is the feeling held in September, 1936, plaintiff, after becoming, agreed to accept a salary, as he says, for the entire year 1937, and to waive his commissions. The contract for a certain salary for the year might well have been the limiting factor which caused him to waive the commissions. However, the question as to whether the contract

made between the parties was for the full year, or for monthly payments, was a question of fact for the jury to determine. Plaintiff testified that it was a yearly contract, and the defendant testified that it was a month to month contract, and after considering all the facts in the case, we cannot say that the finding of the jury was against the manifest weight of the evidence. Therefore, the judgment of the Superior Court is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

made between the parties was for the full year, or for monthly
 payment, was a question of fact for the jury to determine. This
 will testify that it was a yearly contract, and the defendant
 testified that it was a month to month contract, and after consid-
 ing all the facts in the case, we cannot say that the finding of the
 jury was against the manifest weight of the evidence. Therefore,
 the judgment of the Superior Court is affirmed.

AFFIRMED.

WHEEL, J. C. and WILSON, J. CONCUR.

37938

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

ELMER J. LAWLER and JOSEPH M.
PRIMAKOW,

Plaintiffs in Error.

ERROR TO

CRIMINAL COURT

COOK COUNTY.

281 I.A. 605³

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On September 29th, 1933, an indictment containing six counts was returned in the Criminal Court of Cook County, against the defendant, Elmer J. Lawler, and Joseph M. Primakow, Paul Hardt and Robert E. Hogan, in which they are charged in various ways with conspiring together in Cook County, Illinois, to obtain money, personal property and other valuable things by means of false pretenses and the confidence game from various persons whose names are unknown. Hardt was not apprehended, and the defendants, Lawler, Primakow and Hogan pleaded not guilty. The cause was submitted to a jury, which returned a verdict, finding all of the defendants guilty of conspiracy in manner and form as charged in the indictment. Hogan was granted a new trial, and the case was subsequently dismissed as to him. By writ of error issued from this court, the defendant, Elmer J. Lawler, seeks to have the judgment of conviction reversed.

As grounds for reversal, it is urged that defendant was not proved guilty of the crime charged in the indictment beyond all reasonable doubt; that the venue was not proved as alleged in the indictment; that the trial court admitted incompetent and prejudicial evidence over the objection of the defendant; that the court erred in instructing the jury, and that the State's Attorney in the trial and in the argument to the jury, made improper statements calculated to arouse, and which did arouse, the passions and prejudices of the jury against the defendant.

STATE OF ILLINOIS,

Defendant in Error,

v.

ALBERT J. LAWLER and JOSEPH A. TRIMKOE,
Plaintiffs in Error.

CHARGE TO

COCK COUNTY

COCK COUNTY.

281 I.A. 605

Opinion filed June 26, 1935

MR. JUSTICE HALL, delivered the opinion of the court.

On September 23rd, 1933, an indictment containing six

counts was returned in the Criminal Court of Cook County, against

the defendants, Albert J. Lawler, and Joseph A. Trimkoe, both white

and Robert E. Hogan, in which they are charged in various ways with

conspiring together in Cook County, Illinois, to obtain money,

personal property and other valuable things by means of false

pretenses and the collusion of some persons whose names

are unknown. Hogan was not apprehended, and the defendants, Lawler,

Trimkoe and Hogan pleaded not guilty. The case was submitted to

a jury, which returned a verdict, finding all of the defendants

guilty of conspiracy in manner and form as charged in the indictment.

Hogan was granted a new trial, and the case was subsequently

dismissed as to him. By writ of error issued from this court, the

defendant, Albert J. Lawler, seeks to have the judgment of conviction

reversed.

As grounds for reversal, it is urged that defendant was

not proved guilty of the crime charged in the indictment beyond all

reasonable doubt; that the venue was not proved as alleged in the

indictment; that the trial court admitted incompetent and prejudicial

evidence over the objection of the defendant; that the court erred

in instructing the jury, and that the State's attorney in the trial

and in the argument to the jury, made improper statements calculated

to arouse, and which did arouse, the passions and prejudice of the

jury against the defendant.

On behalf of the state, one M. J. Vickman testified in substance that he was employed by a real estate and architectural firm, and that he had charge of the renting of the building at 920 North Michigan Avenue, in the city of Chicago; that in June, 1933, the defendants, Lawler, Primakow and Hogan, rented a room from him in the apartment building known as 920 North Michigan Avenue; that he saw Hogan and Primakow at this building in September and August, 1933.

Ruby M. Haiden testified to the effect that in the summer and early fall of 1933 she was employed by defendant Hogan at Room 725, 11 South La Salle Street, Chicago; that she saw Primakow and Lawler in Hogan's office; that she first met Primakow in the spring of 1933; that Primakow would come in two or three times a week to see Mr. Hardt and Mr. Hogan; that she received telephone calls of Primakow and Lawler; that the name Guardian Company was placed on the door in the spring of 1933; that mail was delivered to the Guardian Company at that office; that she worked for Hogan for eight years, and that Primakow was a client of his; that Lawler, Primakow and Hardt consulted with Hogan when they came to the office.

Joseph J. Spanier testified in substance that in the early fall of 1933, he was employed by Shields & Company, 105 West Adams Street, Chicago, whose business was that of stock brokers; that in the latter part of the month of June, 1933, he handled some transactions for the Guardian Company, at which time he saw Hogan and Lawler in the office of Shields & Company; that he saw Lawler in that office with one Hoffman on an average of two or three times a day for two weeks; that he knew Lawler as Phil Hassert; that Lawler and Hoffman inquired as to how the brokerage firm was proceeding with the business that they had with the firm; that the business related to the sale of stock they were making through the brokerage firm; that

On behalf of the state, one W. J. Friedman testified in substance that he was employed by a real estate and architectural firm, and that he had charge of the renting of the building at 930 North Michigan Avenue, in the city of Chicago; that in June, 1937, the defendants, Lawler, Trimkov and Hogan, rented a room from him in the apartment building known as 930 North Michigan Avenue; that he saw Hogan and Trimkov at this building in September and August,

1937. Emily M. Haden testified to the effect that in the summer and early fall of 1937 she was employed by defendant Hogan at room 726, 11 South La Salle Street, Chicago; that she saw Lawler and Lawler in Hogan's office; that the first met Trimkov in the spring of 1937; that Trimkov would come in two or three times a week to see Mr. Hardt and Mr. Hogan; that she received telephone calls of Trimkov and Lawler; that the name Guardian Company was placed on the door in the spring of 1937; that mail was delivered to the Guardian Company at that office; that she worked for Hogan for eight years, and that Trimkov was a client of his; that Lawler, Trimkov and Hardt consulted with Hogan when they came to the office.

Joseph J. Spangler testified in substance that in the early fall of 1937, he was employed by Shields & Company, 102 West Adams Street, Chicago, whose business was that of stock brokers; that in the latter part of the month of June, 1937, he handled some transactions for the Guardian Company, at which time he saw Hogan and Lawler in the office of Shields & Company; that he met Lawler in that office with one Hogan on a variety of two or three times a day for two weeks; that he knew Lawler as Bill Hissner; that Lawler and Hoffman inquired as to how the brokerage firm was proceeding with the business that they had with the firm; that the business related to the sale of stock they were making through the brokerage firm; that

Lawler had no account with them, but that he was introduced by Hoffman as Mr. Hassert.

Jacob Malkind, a witness on behalf of the state, testified that he resided at 111 West Division Street, and was a hotel manager; that Hardt brought Primakow to the hotel and asked him to give Primakow credit.

Julia V. Gottman, a witness for the state, testified in substance that she resided in Evansville, Indiana; that in the latter part of May and June, 1933, she received by mail circulars of the Robert J. Standish Company regarding stocks and bonds; that after she received the circulars, she received a telephone call, in which it was stated that the caller was Robert Standish & Company; that she told the person inquiring over the telephone that she had no money, and could do no business with them; that they called twice a week on the telephone; that in the early part of July, 1933, at about 7:30 in the evening, a man called upon her who introduced himself as Primakow, and stated that he represented the Standish Company; that he wanted her to get rid of certain stocks which she owned, and that he would be back in the morning to get the stock; that he had secured her name from the Traders Bond Company; that she never saw this person Primakow again until she saw him in the courtroom at the trial; that when she talked with Primakow, he reminded him that he talked very much the same as the person representing himself over the telephone as Mr. Standish; that about a week or ten days later a voice called her again over the telephone; that she believed the call she received was from Primakow and that the two voices were indistinguishable; that about July 10th, 1933, at about 8:00 o'clock in the morning, the defendant Lawler called upon the witness and introduced himself as Mr. Gardner; that he pulled some bonds out of his pocket, exhibited them to the witness, and said that he had purchased these bonds for

Lawler had no account with them, but that he was introduced by

Hoffman as Mr. Bassett.

Joseph Manning, a witness on behalf of the state, testified

that he resided at 111 West Division Street, and was a hotel manager;

that said Manning introduced Trismor to the hotel and asked him to give

Trismor credit.

Julius V. Gottman, a witness for the state, testified in

subpoena that she resided in Evansville, Indiana; that in the latter

part of May and June, 1932, she received by mail circulars of the

Robert J. Swedish Company regarding stocks and bonds; that after

she received the circulars, she received a telephone call, in which

it was stated that the caller was Robert Swedish Company; that she

told the person inquiring over the telephone that she had no money,

and could do no business with them; that they called twice a week on

the telephone; that in the early part of July, 1932, at about 7:30

in the evening, a man called upon her and introduced himself as

Trismor, and stated that he represented the Swedish Company; that

he asked her to get rid of certain stocks which she owned, and that

he would be back in the morning to get the stock; that he had secured

her name from the Robert Swedish Company; that she never saw this person

Trismor again until she saw him in the courtroom at the trial; that

when she talked with Trismor, she reminded him that he talked very

much the same as the person representing himself over the telephone

as Mr. Swedish; that about a week or ten days later a voice called

her again over the telephone; that she believed the call and received

call from Trismor and that the two voices were identical;

that about July 10th, 1932, at about 8:00 o'clock in the morning, the

defendant Lawler called upon the witness and introduced himself as

Mr. Trismor; that he carried some bands out of his pocket, exhibited

them to the witness, and said that he had purchased these bands for

his mother, and that he had made \$10,000 to \$15,000 out of the purchase; that he asked her for the 500 shares of Henion-Hobbell stock owned by the witness, and stated that as soon as he got \$3,000 for this stock, he would buy Government bonds for the witness and send the same to her and that he had an office at 100 North La Salle Street, Chicago. The witness further testified to the effect that she went to defendant's car with him, that he showed her an envelope with Standish & Company in the corner, addressed to Robert Standish & Company, Suite 712, 100 North La Salle Street, Chicago; that she accompanied Lawler, otherwise known as Gardner, to the postoffice that morning, and in the envelope which he gave her she mailed these bonds to Robert Standish & Company at the address already given her by Lawler; that Lawler, otherwise known as Gardner, asked her if she had any money in the bank, and that he then gave her a receipt for her bonds. The receipt which Lawler gave the witness, to which he signed the name James G. Gardner, is as follows:

"Robert J. Standish Company, Investment Securities,
20 East Jackson Boulevard, suite 820. Phone Harrison 7490.
Chicago. Date, July (blank) 1933. Received of Mrs. Charles
Gottman, \$3,000 in cash, dollars. (\$3,000.00) in cash dollars.
The same being payment of \$3,000.00 in Liberty bonds due
1951-1955 at 99-00 per 100-00. Will make good if stock
Henion-Hobbell should go up by September 25, 1933.

James G. Gardner, representative."

The witness further testified in substance that Lawler, otherwise known as Gardner, stated to her at the postoffice that morning that she would get the return registered receipt shortly thereafter, and that she would hear from him right away and that through a lawyer representing Mr. Standish she would receive her money in a week or ten days; that a few days later she received a telephone call from a person whose voice sounded like that of Primakow; that the voice stated that it was Robert J. Standish speaking; that the person who spoke

his father, and that he had made \$10,000 to \$15,000 out of the purchase; that he asked her for the 500 shares of Hamilton-Webster stock owned by the witness, and stated that as soon as he got \$1,000 for his share, he would pay Government bonds for the witness and send the same to her and that he had an office at 100 North La Salle Street, Chicago. The witness further testified to the effect that she went to defendant's car with him, that he showed her an envelope with Standard & Company in the corner, addressed to Robert Standard & Company, 216 1/2, 100 North La Salle Street, Chicago; that she accompanied lawyer, otherwise known as Gardner, to the postoffice that morning, and in the envelope which he gave her she mailed three bonds to Robert Standard & Company at the address already given her by lawyer; that lawyer, otherwise known as Gardner, asked her if she had any money in the bank, and that he then gave her a receipt for her bonds. The receipt which lawyer gave the witness, to which he signed the name James G. Gardner, is as follows:

"Robert L. Standard Company, Investment Securities,
 50 East Jackson Boulevard, Suite 320, Phone Madison 7400.
 Chicago, Ill. July 1937.
 Received of Mrs. Charles
 Webster, \$5,000 in cash, dollar (\$5,000.00) in cash collectible.
 The same being payment of \$5,000.00 in thirty bonds due
 1931-1935 at 5-00 per 100-00. Will acknowledge if stock
 Hamilton-Webster bonds as by September 15, 1937.

James G. Gardner, representative."

The witness further testified in substance that lawyer, otherwise known as Gardner, stated to her at the postoffice that morning that she could get the return registered receipt shortly thereafter, and that she would hear from him again and that through a lawyer representative-
 ing Mr. Standard she would receive her money in a week or ten days;
 that a few days later she received a telephone call from a person
 whose voice sounded like that of Gardner; that the person who spoke
 that it was Robert L. Standard speaking; that the person who spoke

to her over the telephone told her that 100 shares of Packard stock had been purchased for her, and that she should send them \$600.00; that in compliance with the request, she did mail a check direct to Robert J. Standish & Company, Suite 712, 100 North La Salle Street, Chicago, payable to Robert J. Standish Company; that the check was cashed and returned to her, endorsed by Robert J. Standish, Irv Stein and Steve Maday; that this same person stated to her that they had bought her other shares of Packard stock, and that she should mail a check or draft for \$1,600.00 to pay for the same; that she asked about the Henion-Hobbeal bonds, and was informed that she would get her money for the bonds in a few days; that a few days later this same voice told her that they had collected \$750.00 for her; that she came to Chicago about August 28th, 1933, went to 100 North La Salle Street and learned that the alleged firm of Standish & Company had no office in the building; that when she gave Lawler the 500 shares of stock, he gave her a receipt for \$3,000, and promised to send her \$3,000 in cash, or buy Government bonds and that Lawler afterwards mailed back to her the stock she originally gave him.

Otto Palmer, a witness for the state, testified that his home was at Griswold, Iowa; that about July 27th, 1933, he had 300 shares of Cities Service stock which he mailed to Robert J. Standish at Suite 720, 100 North La Salle Street, Chicago; that before he mailed the stock he had five or six telephone calls; that he never got the stock back, and never received any money for it; that he was called on the telephone by a man who represented himself as Robert J. Standish.

Steve Maday, a witness for the state, testified in substance that he is in the garage business in Evanston, Illinois; that he had seen the check which the witness, Julia Gottman, testified about; that Hogan brought it to the witness and asked the witness to cash it for him; that the witness told him he could not cash it, but that he would

to her over the telephone told her that 100 shares of Standard stock
had been purchased for her, and that she should send them \$20.00;
that in compliance with the request, she did mail a check for \$20.00
Robert J. Standish & Company, Suite 715, 100 North La Salle Street,
Chicago, payable to Robert J. Standish Company; that the check was
cashed and returned to her, endorsed by Robert J. Standish, Inc.
Stein and Steve Maddy; that this same person stated to her that they
had bought her other shares of Standard stock, and that she should
mail a check or draft for \$1,500.00 to pay for the same; that she
asked about the Vernon-Hobbs bonds, and was informed that she would
get her money for the bonds in a few days; that a few days later this
same voice told her that they had collected \$750.00 for her; that
she came to Chicago about August 28th, 1937, went to 100 North La
Salle Street and learned that the alleged firm of Standish & Company
had no office in the building; that when she gave her the 500
shares of stock, he gave her a receipt for \$7,500.00, and promised to
send her \$1,500 in cash, or any Government bonds and that he later
afterwards called back to her the stock she originally gave him.
Otto Palmer, a witness for the state, testified that his
home was at Chicago, Ill.; that about July 15th, 1937, he had 100
shares of Office Service stock which he mailed to Robert J. Standish
at Suite 715, 100 North La Salle Street, Chicago; that before he
mailed the stock he had five or six telephone calls; that he never
got the stock back, and never received any money for it; that he was
called on the telephone by a man who represented himself as Robert J.
Standish.
Steve Maddy, a witness for the state, testified in substance
that he is in the same business in Evanston, Illinois; that he has
seen the check which the witness, Julia Götter, testified about; that
Hogan brought it to the witness and asked the witness to cash it for
him; that the witness told him he could not cash it, but that he would

put it through the bank for collection, which he did, and that a few days later the bank had informed him that it had received the money on the check; that he called Hogan and Hogan came down the same day and got the money, less the collection fee; that he later informed Hogan that an officer from the State's Attorney's office had visited him and inquired about the check, and that Hogan told him not to mention his, Hogan's, name in connection with it, but that he should tell the officer that Mr. Standish kept his car at the witness' garage, and had given the witness this check to run through the bank for him; that when the witness had been asked to go to the State's Attorney's office, Hogan said to the witness, "Whatever you do, don't mention my name with reference to the check."

Eugene O'Connor, a witness for the state, testified to the effect that he was chief investigator of the Blue Sky Division of the State's Attorney's office, Cook County, Illinois; that he received the cancelled check from Mrs. Gottman of Evansville, Indiana; that he went to 100 North La Salle Street, Room 712, Chicago, and found that there was no Robert J. Standish Company there; that he then went to the office of Shields & Company, Bankers Building, 105 West Adams Street, Chicago, and then to the courtroom in the Federal Building and saw Hogan and the defendant Lawler sitting together; that he had his first conversation with Lawler in Room 507 County Building; that he asked Lawler if he knew Primakow, and he said, "No;" that he asked him if he knew Hogan, and he said, "No;" that he asked him if he knew of the Guardian Company, and that Lawler said, "No;" or whether he knew Mrs. Gottman, and he said, "No." The witness further stated that he asked Lawler if he had ever been at 920 North Michigan Avenue, and the defendant said, "No;" that he asked Lawler if he worked for the Standish Company, and he said "Yes;" that he

but it through the bank for collection, which he did, and that a few days later the bank had informed him that it had received the money on the check; that he called Hogan and Hogan came down the same day and got the money, less the collection fee; that he later informed Hogan that an officer from the State's Attorney's office had visited him and inquired about the check, and that Hogan told him not to mention his, Hogan's, name in connection with it, and that he should tell the officer that Mr. Standish kept his car at the witness' garage, and had given the witness this check to run through the bank for him; that when the witness had been asked to go to the State's Attorney's office, Hogan said to the witness, "Whatever you do, don't mention my name with reference to the check."

Witness, Standish, a witness for the State, testified to the effect that he was chief investigator of the New York Division of the State's Attorney's office, Cook County, Illinois; that he received the cancelled check from Mr. Gottman of Bensenville, Illinois; that he went to 100 North La Salle Street, Room 711, Chicago, and found that there was no Robert J. Standish Company there; that he then went to the office of Michael A. Company, General Building, 102 West Adams Street, Chicago, and then to the courtroom in the Federal Building and saw Hogan and the defendant together sitting together; that he had his first conversation with Hogan in Room 207 County Building; that he asked Hogan if he knew Standish, and he said, "No"; that he asked him if he knew Hogan, and he said, "No"; that he asked him if he knew of the Michael A. Company, and he said, "No"; or whether he knew Mr. Gottman, and he said, "No." The witness further stated that he asked Hogan if he had ever seen at 207 North Michigan Avenue, and the defendant said, "No"; that he asked Hogan if he worked for the Standish Company, and he said "Yes"; that he

Lawler, stated to the witness that he had met Mr. Standish on Michigan Avenue, and that Standish told him he had an office at 100 North La Salle Street. The witness stated that the defendant afterwards admitted that he had called on Mrs. Gottman at Evansville, Indiana, and gave her his name as Gardner.

No witnesses were produced on the trial on behalf of any of the defendants, except Hogan. It is not denied that the defendants Lawler and Primakow visited the witness, Mrs. Julia V. Gottman, at her home in Evansville, Indiana, ^{that Lawler} and told her that he represented Robert J. Standish & Company of Chicago; that Lawler gave her the name of Gardner, and not his own name; that he signed a receipt in the name of Gardner for \$3,000.00 worth of stock owned by the witness; that after this visit upon solicitation over the telephone by a person whose voice the witness testified as that of Primakow, she sent a check for \$800.00 to Robert J. Standish Company, a fictitious firm whose name was given to her by Lawler; that thereafter the check came into the hands of Hardt, one of the defendants, and was cashed; that although Lawler returned the stock to the witness, none of the defendants returned the money to her representing the amount of the check; that the witness, Otto Palmer, after a telephone call, sent shares of stock in the Cities Service Company to Robert J. Standish Company, Room 712, 100 North La Salle Street, Chicago, and never received his stock back, and never received any money for it; that he was called on the telephone by a man who represented himself as Robert J. Standish; that the defendants were frequently seen in each other's company, and were in frequent communication with each other. While it is true that the burden is upon the state to prove the defendants guilty beyond a reasonable doubt, and that it is improper in a criminal case to comment upon the fact that the defendant did not take the stand in his own defense, still we are prone to take

...stated to the witness that he had met Mr. ...
...and that ... told him he had an office at ...
...The witness stated that the defendant ...
...admitted that he had called on Mr. ... at ...
...and gave her his name as ...

...no witness was produced on the trial on behalf of ...
...of the defendants, except ... It is not denied that the ...
...and ... visited the witness, ... Julia V. ...
...that lawyer
...her name in ... and told her that he represented

...Robert L. ... of Chicago; that lawyer ... her the
...name of ... and not his own name; that he signed a receipt in
...the name of ... for \$2,500.00 ... of ... by the witness;
...that after this visit upon ... over the telephone by a

...person whose voice the witness testified as that of ... the
...sent a check for \$200.00 to Robert L. ... a ...
...first check was given to her by ... that thereafter the check
...came into the hands of ... one of the defendants, and was cashed;
...that although ... returned the check to the witness, none of the
...defendants ... the money to her representing the ... of the
...check; that the witness, after a ... call, sent
...check of stock in the ... to Robert L. ...
...Newberry, Room 715, 100 North La Salle Street, Chicago, and never

...received his stock ... and never received any money for it; that
...he was called on the telephone by a man who represented himself as
...Robert L. ... that the defendants were frequently seen in ...
...other's company, and were in frequent communication with each other.

...while it is true that the ... is upon the ... to prove the
...defendants guilty beyond a reasonable doubt, and that it is improper
...in a criminal case to comment upon the fact that the defendant did
...not take the stand in his own defense, still he is bound to take

into consideration the fact that no testimony was offered in the trial on behalf of Lawler or any of the defendants, except Hogan, and that the testimony of the state's witnesses stands uncontradicted.

In People v. Fox, 319 Ill. 606, in commenting upon the weight to be given to the testimony of witnesses offered by the state in a criminal case, which evidence stood uncontradicted, the Supreme Court said:

"There are many things revealed on the cross-examination which seriously affect the credit to be given the testimony of most of the witnesses for the prosecution. If their testimony did not stand in the record wholly uncontradicted, there might be some basis for the argument that their testimony is unworthy of credit. All these witnesses were cross-examined at length, and the jury had before them all the discrediting facts."

It is claimed that the venue is not properly proven. It is uncontradicted that in the latter part of May and June, 1933, Mrs. Julia V. Gottman received circulars from Robert J. Standish Company of Chicago regarding stocks and bonds offered for sale; that Lawler signed a receipt for the stock he received from Mrs. Gottman as James G. Gardner, representative of Robert J. Standish Company, Investment Securities, 20 E. Jackson Blvd., Suite 820, Phone Harrison 7490, Chicago; that the address of all of the alleged conspirators was found by a police officer to have been in Chicago; that both Primakow and Lawler visited Mrs. Gottman in regard to the matters testified about, and that these defendants are shown to have been in frequent communication with each other in the city of Chicago, county of Cook and state of Illinois prior and subsequent to the time of the visit of Primakow and Lawler to Mrs. Gottman, and prior to the time of the receipt of stocks from Palmer by the so-called Standish Company. We are of the opinion that the venue was amply proven.

Defendant insists that the court erred in refusing to give

into consideration the fact that no testimony was offered in the trial on behalf of Barker or any of the defendants, except Barker, and that the testimony of the state's witnesses stands uncontradicted. In People v. Fox, 119 Ill. 606, in commenting upon the

point to be given to the testimony of witnesses offered by the state in a criminal case, which evidence stood uncontradicted, the

supreme court said:

"There are many things revealed in the cross-examination which seriously affect the credit to be given the testimony of most of the witnesses for the prosecution. If their testimony did not stand in the record wholly uncontradicted, there might be some basis for the argument that their testimony is unworthy of credit. All these witnesses were cross-examined at length, and the jury had before them all the discrediting facts."

It is claimed that the venue is not properly proven. It

is uncontested that in the latter part of May and June, 1935,

Mrs. Julia F. Bottom received a check from Robert J. Standish

Company of Chicago for the purchase of stocks and bonds of said company; that

Barker signed a receipt for the stock he received from Mrs. Bottom

as James E. Barker, representative of Robert J. Standish Company,

Investment Securities, 10 E. Jackson Street, Suite 802, Chicago, Illinois

7400, Chicago; that the address of all of the alleged conspirators

was found by a police officer to have been in Chicago; that both

Trinkley and Barker visited Mrs. Bottom in regard to the matter

testified about, and that these defendants are known to have been

in frequent communication with each other in the city of Chicago,

county of Cook and state of Illinois prior and subsequent to the

time of the first of January and Barker to Mrs. Bottom, and prior

to the time of the receipt of stocks from Barker by the so-called

Standish Company, to wit of the opinion that the venue was properly

proven.

Defendant insists that the court erred in refusing to give

the following instruction:

"The court instructs the jury that in order to warrant a conviction for crime on circumstantial evidence, the circumstances, taken together should be of a conclusive nature and tendency, leading on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged; and it is the invariable rule of law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the parties charged, and as cannot, upon any reasonable theory, be true and the parties charged be innocent, and in this case, if all the facts and circumstances relied upon by the people to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendants, then the jury should acquit them."

We have carefully examined the instructions given both by the state and the defendant, and it is our conclusion that the jury was fully and fairly instructed, and that the court was not in error in refusing to give the instruction noted. It is our opinion that there was sufficient positive and uncontradicted evidence as to the guilt of these defendants to justify the jury in returning the verdict finding them guilty of the conspiracy charged and that the venue of such conspiracy was properly laid in Cook County. Therefore, the judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

the following instructions:

"The court instructs the jury that in order to warrant a conviction for crime on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leaving no other rational inference but that of guilt. In effect, a reasonable and sound conclusion, and no one else, committed the offense charged; and it is an inviolable rule of law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the parties charged, and no convict, upon any reasonable theory, be free and the parties charged be innocent, and in this case, it is the fact and circumstance relied upon by the people to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit them."

We have carefully examined the instructions given both by the state and the defendant, and it is our conclusion that the jury was fully and fairly instructed, and that the court was not in error in refusing to give the instruction demanded. It is our opinion that there was sufficient positive and uncontradicted evidence as to the guilt of these defendants to justify the jury in returning the verdict finding them guilty of the conspiracy charged and that the venue of such conspiracy was properly laid in Cook County. Therefore, the judgment is affirmed.

ATTORNEYS.

HARRIS, J. & WILSON, J. CLERK.

38037

UNIVERSITY STATE BANK, a Corp.,

Plaintiff (Appellant),

v.

KATIE SACK and BERNARD SACK,

Defendants (Appellees).

PETITION FOR LEAVE

TO APPEAL FROM

281 I.A. 605⁴

SUPERIOR COURT

COOK COUNTY.

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case comes to this court on a petition for leave to appeal from an order of the Superior Court of Cook County, granting a new trial. The order was entered on motion of the defendants after the verdict of a jury finding the issues against the defendant, and assessing plaintiff's damages in the sum of \$992.50. The case is considered here on the petition and defendants' reply thereto.

The action is based upon the charge that plaintiff bank, at the request of the defendants, advanced the sum of \$2,990.00 to pay the interest, as it became due, on bonds secured by a real estate mortgage, such interest charges being evidenced by coupon notes. It is further charged that defendants promised to pay the plaintiff bank the amount of such advancement at the time they were made; that of the sum of \$2,990.00 advanced by plaintiff bank, \$2,000.00 had been paid, leaving a balance due to the plaintiff of \$990.00, together with certain interest. The declaration is supported by the affidavit of C. W. Hoff, president of the plaintiff bank, and in it affiant avers that about December 1st, 1930, the defendants requested a loan from the plaintiff of the sum of \$2,990.00, with which to pay interest coupon notes, which accrued on December 1st, 1930, on a first mortgage of \$92,000.00 on certain premises in the city of Chicago; that plaintiff upon such request of the defendants, and upon their promise to repay the sum so advanced, together with

3807

UNIVERSITY MICROFILMS, INC.

(Incorporated in Michigan)

v.

KATY BAKER AND HERMAN BAKER

(Defendants)

FILED FOR JURY

TO APPEAR AT

381 A.A. 605

SUPERIOR COURT

DOCK COUNTY

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case comes to this court on a petition for leave to

appeal from an order of the Superior Court of Dock County, granting

a new trial. The order was entered on motion of the defendants

after the verdict of a jury finding the issues against the defendants

and assessing plaintiff's damages in the sum of \$25,000.00. The case

is considered here on the petition and defendants' reply thereto.

The action is based upon the charge that plaintiff bank,

at the request of the defendants, advanced the sum of \$2,500.00 to

pay the interest, as it became due, on bonds secured by a real

estate mortgage, such interest charges being evidenced by coupon

notes. It is further charged that defendants promised to pay the

plaintiff bank the amount of such advancement as the time they were

made; that of the sum of \$2,500.00 advanced by plaintiff bank,

\$2,000.00 had been paid, leaving a balance due to the plaintiff of

\$500.00, together with certain interest. The declaration is supported

by the affidavit of H. A. Holt, president of the plaintiff bank,

and in its affidavit made about December 1st, 1935, the defendants

requested a loan from the plaintiff of the sum of \$2,500.00, with

which to pay interest coupon notes, which matured on December 1st,

1935, on a first mortgage of \$25,000.00 on certain premises in the

city of Chicago; that plaintiff upon such request of the defendants,

and upon their promise to repay the sum so advanced, loaned with

interest thereon until paid, did advance the money, and did, out of such funds, pay such interest notes in the amount named. The payments made are set forth in detail, and the affiant states that after giving credit to defendants for the total amount paid by them upon account of the sum so advanced by plaintiff, at the time of the filing of the suit, there remained due a principal sum of \$990.00, which, together with the accrued interest which remained unpaid, left a total of \$1,026.10 due to the plaintiff.

In the affidavit of merits filed with defendants' plea of the general issue, defendants deny that they at any time requested a loan from plaintiff of the sum mentioned with which to pay the interest coupon notes, as alleged. They aver that the plaintiff was the owner of the coupon notes and the bonds to which the same were attached, or that plaintiff was the house of issue of the bonds, that the said bonds became due and payable at the office of the plaintiff, and that plaintiff, in order to protect the property, in its own interest, advanced the money for the payment of these coupon notes, that defendants were not liable upon the notes, and that plaintiff did not lend them the money to pay the same; that the bank had no power or authority under its charter to make loans of the character mentioned, which loans were not made according to approved banking methods; that the plaintiff did not pay the coupon notes, as alleged, when they were presented, and that the defendants neither borrowed the money from plaintiff as alleged, nor promised to pay the same.

Defendants were not the makers of the bonds and coupon notes in question, nor of the mortgage given to secure the payment of the same. Whether they held the legal title to the mortgaged property or not, is not clear from the record. It is agreed, however, that during the times in question, defendants were in possession of

interest thereon until paid, and advance the money, and did not
of such kind, say upon interest notes in the amount named. The
payments were not set forth in detail, and the plaintiff stated that
after giving credit to defendant for the total amount paid by him
upon account of the sum so advanced by plaintiff, at the time of the
filing of the suit, there remained due a principal sum of \$880.00,
which, together with the accrued interest, amounted to \$940.10,
a total of \$1,028.10 due to the plaintiff.

In the affidavit of service filed with defendant, like to
the general issue, defendant deny that they at any time requested
plaintiff to pay the plaintiff of the sum mentioned, and that to pay the
interest thereon, as alleged. They aver that the plaintiff was
the owner of the coupon notes and the bonds to which the same were
attached, on that plaintiff was the holder of issue of the bonds,
that the said coupon notes and bonds were in the office of the
plaintiff, and that plaintiff, in order to protect the property, in
its own interest, advanced the money for the payment of these coupon
notes, and defendant were not liable upon the notes, and that
plaintiff did not loan the money to pay the same; that the bank
did so cover or satisfy under its charter as to the loss of the
character of the notes, which were not made according to the
banking records; that the plaintiff did not pay the coupon notes,
as alleged, when they were presented, and that the defendant neither
borrowed the money from plaintiff as alleged, nor promised to pay
the same.

Defendant were not the holders of the bonds and coupon
notes in question, nor of the mortgage given to secure the payment
of the same, and that they held the legal title to the mortgaged
property or not, is not clear from the record. It is stated, however,
that during the time in question, defendant were in possession of

the mortgaged property, and were collecting the rents. It is the theory of defendants that the only agreement with plaintiff was to the effect that they, defendants, would collect and turn over to the plaintiff the rents received by them while they were in possession of the property, and that these moneys should be used in paying the interest charges in question; that after about April 1st, 1931, when a receiver was appointed for the property in question, possession was taken away from defendants, and they were thereby prevented from collecting any further rents, and that thereafter, any obligation they owed to the plaintiff had ceased. The evidence indicates that the money was advanced by plaintiff to pay these coupon notes as they became due.

Mr. Charles W. Hoff, president of the bank, testified to the effect that the moneys were advanced to pay these coupon notes at the request of the defendants, and that they agreed to pay the amount advanced by plaintiff at the rate of \$750.00 a month, beginning January 1st, 1931, and that the money had been advanced in December, prior to that time.

John W. Algar, cashier of plaintiff bank, testified that "about the middle of December, after I was called in at this meeting at which Mr. Sack, Mrs. Sack and Mr. Hoff were present, Mr. Hoff brought Mr. and Mrs. Sack to my desk and told me how they were going to pay. Mr. Hoff stated to me that Sack was going to pay \$750.00 interest due December 1st, 1930. The payments were to begin in January, and were to be paid every month thereafter, January, February, March and April, until the \$2,990.00 was paid." This witness, after examining certain records of the bank, further testified that the bank had paid out to the bondholders in the payment of these coupon notes, the sum of \$2,986.50, and that the total amount received from defendants under the alleged agreement was \$1,997.50.

the mortgaged property, and were collecting the rents. It is the theory of defendants that the only agreement with Plaintiff was to the effect that they, defendants, would collect the rents and to the Plaintiff the rents received by them while they were in possession of the property, and that these moneys should be paid in paying the interest charges in question; that after about April 1st, 1931, when a receiver was appointed for the property in question, possession was taken away from defendants, and they were thereby prevented from collecting any further rents, and that thereafter any obligation they owed to the Plaintiff had ceased. The evidence indicates that the money was advanced by Plaintiff to pay these coupon notes as they became due.

Mr. Charles J. Holt, president of the bank, testified to the effect that the moneys were advanced to pay these coupon notes at the request of the defendants, and that they agreed to pay the amount advanced by Plaintiff at the rate of 7.50.00 a month, beginning January 1st, 1931, and that the money had been advanced in December, prior to that time.

John W. Ligon, cashier of Plaintiff bank, testified that about the middle of December, after I was called in at this meeting at which Mr. Holt, Mr. Holt were present, Mr. Holt, president of the bank, and Mr. Holt told me how they were going to pay. Mr. Holt stated to me that they were going to pay 7.50.00 interest the December 1st, 1930. The payments were to begin in January, and were to be paid every month thereafter, January, February, March and April, until the \$2,940.00 was paid. This witness, after examining certain records of the bank, further testified that the bank had paid out to the defendants in the payment of these coupon notes, the sum of \$2,940.00, and that the total amount received from defendants under the above agreement was \$1,000.00.

Bernard Sack, one of the defendants, testified that "the University State Bank did not place to my credit, or to Mrs. Sack's credit, or to our joint credit, the sum of \$2,990.00, or any other sum of money in this connection. We had no account there. Mr. Hoff did not at any time make available to us the sum of \$2,990.00, or any other sum." This witness further testified that he had an interest in the property in question; that "I had a conversation with Mr. Hoff at the bank before the first of December, 1930, ***. My mother, Mrs. Sack, Mr. Hoff, Mr. Sherwin and myself were present. We explained to Mr. Hoff and Mr. Sherwin the exact status of the property, how much it was bringing in, how much the expenses were, and what the net amount of money was left over each month, and we promised to pay the net amount of money that was left over each month to the bank, as the bank was handling it for the first mortgagee, as well as handling it for Mr. Sherwin." Sherwin referred to here, was the maker of the mortgage trust deed, the bonds and the coupon notes in question.

Upon the issues made, and upon the evidence adduced, the jury had before it only a question of fact. Upon the only issue in the case, the jury returned a verdict for the plaintiff, as already stated, which verdict was justified by the evidence, and we can see nothing in the record which warranted the granting of a new trial. The petition for leave to appeal is allowed, the order of the Superior Court, granting a new trial, is reversed, and it is further ordered that judgment be entered here for the amount of the verdict - \$992.50.

REVERSED AND JUDGMENT HERE IN FAVOR
OF PLAINTIFF FOR \$992.50.

HEBEL, P.J. AND WILSON, J. CONCUR.

38248

HARRY O. HEIN,

Appellee,

v.

EDWARD CURDA, et al,

Defendants.

On Appeal of DANIEL D. CRAFT,
as Trustee,

Appellants.

INTERLOCUTORY APPEAL

SUPERIOR COURT

COOK COUNTY.

281 I.A. 606¹

Opinion filed June 26, 1935

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Superior Court of Cook County, appointing a receiver in a proceeding brought to foreclose a mortgage trust deed on real estate, given to secure the payment of certain notes. The bill of complaint was filed on the 6th day of September, 1934. Thereafter, on the 17th day of September, 1934, the defendants filed an appearance, and on the 11th day of October following, an answer to the bill. Thereafter on March 30th, 1935, complainant filed a petition, in which it is alleged that the full amount of the indebtedness which the mortgage trust deed was given to secure, was due and payable, that a certain amount of taxes for the years 1931, 1932, 1933 and 1934, which, by the terms of the mortgage trust deed, were to be paid by the mortgagor, were due and unpaid, that insurance upon the property mortgaged, agreed to be paid by the mortgagor, had not been paid, and that installments of interest on the mortgage indebtedness remained unpaid: XXXX Thereafter notice was served upon the defendants that on Saturday, March 30th, 1935, complainant would ask that a receiver be appointed for such premises. Thereafter, on the said 30th day of March, 1935, the following order was entered in the Superior Court of Cook County:

281 I.A. 606

COOK COUNTY

SOUTHERN COUNTY

INVESTIGATION REPORT

On appeal of JAMES E. SMITH,
the Trustee,
Appellants.

Defendants.

EDWARD CRODA, et al.,

v.

Appellee.

JAMES E. SMITH,

Appellant.

Opinion filed June 26, 1935

THE JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA

This is an interlocutory appeal from an order of the

Superior Court of Cook County, appointing a receiver in a proceeding

brought to foreclose a mortgage loan on real estate, given to

secure the payment of certain notes. The bill of complaint was

filed in the city of Chicago, 1934. Thereafter, on the 17th

day of September, 1934, the defendant filed an answer, and on

the 17th day of October following, in answer to the bill. There-

after on March 20th, 1935, complaint filed a petition, in which it

is alleged that the full amount of the indebtedness which the

mortgage trust deed was given to secure, was due and payable, that

a certain amount of taxes for the years 1931, 1932, 1933 and 1934,

which, by the terms of the mortgage trust deed, were to be paid by

the mortgagor, were due and payable, that judgment upon the property

thereon, should be made, and by the mortgage, had not been made,

and that judgment of default on the mortgage indebtedness

remained unpaid. XXXX The master of the vessel was served with the return

made that on January, March 20th, 1935, complaint could not be

a receipt be obtained for such proceeds. Thereafter, on the 17th

20th day of March, 1935, the following order was entered in the

Superior Court of Cook County:

"On motion of attorney for plaintiff asking that a receiver be appointed to collect rents for the premises described in the bill of complaint in said cause and the court being fully advised doth order and appoint Robert E. Gothard, 9305 Ogden Ave., Congress Park, Ill., who has consented to serve without charge and upon his giving bond in the sum of Five Hundred dollars."

"An Act concerning the appointment and discharge of receivers," Approved May 15, 1903, In force July 1, 1903, Cahill's Illinois Revised Statutes, 1933, Chapter 22, Par. 55, provides:

"That before any receiver shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court or judge may order and with security to be approved by the court or judge, conditioned to pay all damages, including reasonable attorneys' fees sustained by reason of the appointment and acts of such receiver, in case the appointment of such receiver is revoked or set aside; provided, that bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond."

From the record, it appears that complainant filed no bond, as required by the statute, nor was he ordered to file such bond. There is no recitation in the order to the effect that the bond of complainant is not required, and stating the reasons why no such bond is required, as the statute provides.

In National Plumbing & Heating Supply Co., v. Illinois Wood Preserving Co., 239 Ill. App. 69, this court said:

"Although a record may show sufficient grounds for the appointment of a receiver, if the court appoints a receiver without requiring a bond from the moving party, under the exception in the statute, unless it is expressly stated in the order of appointment that the receiver is to be appointed without such bond, the order is erroneous; in other words, the order of appointment of a receiver in such a case must itself show that the necessity of giving a bond by the moving party is expressly dispensed with."

In its opinion in the last mentioned case, the court cites many Supreme and Appellate Court cases to the same effect. See also Sherman Park State Bank v. Loop Office Building Corp., 238 Ill. App.

[illegible]

10. The following is a list of the names of the persons who have been identified as having been in contact with the subject during the period of the investigation:

"That before my receipt could be returned the party making the application shall give bond to the receiver in such security as the court or judge may order and the security to be approved by the court or judge, conditioned to pay all damages, including reasonable attorney's fees, sustained by reason of the appointment and acts of such receiver, in case the appointment of such receiver is reversed; and, provided, the bond need not be returned, when the court so orders, and upon notice to that effect, the court of a motion that a receiver be not to be appointed without such bond."

From the record, it appears that a complaint filed on bond, as required by the statute, was not returned to this court. There is no notation in the order for the return of the bond or compliance with the statute, and stating the reasons why no such bond is required, as the statute provides.

[illegible]

Wood Learning Center, 1115 1st St., San Francisco, CA 94107

[illegible]

In the opinion of the local authorities, the project will have
significant and beneficial effects on the community. The project

While Rule 21 of this court provides that "where and interlocutory order or decree is entered on an ex parte application, the party proposing to take an appeal therefrom shall first present, on notice, a motion to vacate the order or decree to the trial court entering such order or decree" within the time fixed by the rule, we are of the opinion that this rule has no application to the instant case. The record does not indicate that the hearing on the petition to appoint the receiver was "on an ex parte application". On the contrary, it is shown that defendants had filed an answer, had notice of the application, and, in so far as the record indicates, were in court at the time the order appointing the receiver was entered. We are of the opinion that the court was in error in not requiring plaintiff to give a bond, as provided by statute, or, if a bond was not required, that the order show the reason why it was dispensed with. Therefore, the order appointing the receiver is reversed.

REVERSED.

HEBEL, P.J. AND WILSON, J. CONCUR.

While Rule 11 of this court provides that where an
interlocutory order is entered on an ex parte application,
the party opposing to take an appeal therefrom shall first present,
on notice, a motion to vacate the order or to stay its execution,
entering such order as the court may direct within the time fixed by the rule,
we are of the opinion that this rule has no application to the
present case. The record does not indicate that the hearing on the
petition to appoint the receiver was "on an ex parte application".
On the contrary, it is shown that defendant had filed an answer,
had notice of the application, and, in so far as the record indicates,
were in court at the time the order appointing the receiver was
entered. We are of the opinion that the court was in error in
not requiring plaintiff to give a bond, as provided by statute, or,
if a bond was not required, that the order show the reason why it
was dispensed with. Therefore, the order appointing the receiver is
reversed.

REVEREND.

HERBELL, P.J. AND WILSON, J. CONCUR.

37780

PEOPLE OF THE STATE OF ILLINOIS,

23
ERROR TO

Plaintiff in Error,

MUNICIPAL COURT

v.

ED SANORIS,

OF CHICAGO.

Defendant in Error.

281 I.A. 606²

Opinion filed June 26, 1935

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The defendant in this case, Ed Sanoris, was arrested on the 5th day of January, 1934, charged with driving a motor vehicle while intoxicated. He was tried on the same day by the court without a jury and convicted and sentenced to the House of Correction for 30 days and fined \$200 and costs. January 12th, seven days later, by counsel, he served notice of a motion under Section 89 of the Practice Act, to vacate the judgment. The motion was allowed and the judgment vacated, a new trial had on January 16, 1934, the defendant found guilty and placed on probation for one year. The People of the State of Illinois sued out a writ of error to review the order granting the prayer of the petition filed in accordance with Section 89 of the Practice Act vacating the judgment of conviction in accordance with the prayer of the petition. The petition among other things alleges that at the time of the trial Sanoris was a minor of the age of 20 years and resided with his parents; that he had never been arrested before; that he was employed by the Union Bag and Paper Company; that he was arrested January 5, 1934, about 12:30 A. M. and at the time of the trial was totally unprepared and unable to engage counsel; that the police refused his request to communicate with his parents; that if he had been allowed time he could have produced witnesses who would have testified that prior to his arrest he was not intoxicated nor in the habit of drinking liquor.

STATE OF ILLINOIS

IN SENATE

1935

CHAMBERLAIN

Defendant in Error.

231 I.A. 606

Opinion filed June 26, 1935

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.
 The defendant in this case, CHAMBERLAIN, was arrested on
 the 25th day of January, 1934, charged with driving a motor vehicle
 while intoxicated. He was tried on the same day by the court without
 jury and convicted and sentenced to the House of Correction for 30
 days and fined \$20 and costs. January 15th, seven days later, by
 counsel, he served notice of a motion which recited 22 of the Practice
 Act, to vacate the judgment. The motion was allowed and the judgment
 vacated, a new trial had on January 16, 1934, the defendant found
 guilty and placed on probation for one year. The people of the State
 of Illinois sued out a writ of error to review the order granting
 the prayer of the petition filed in accordance with section 23 of
 the Practice Act vacating the judgment of conviction in accordance
 with the prayer of the petition. The petition named other things
 alleges that at the time of the trial Chamberlain was a minor of the age
 of 30 years and resided with his parents; that he had never been
 arrested before; that he was employed by the Union and was a
 company; that he was arrested January 15, 1934, about 11:30 A. M.
 and at the time of the trial was totally intoxicated and unable to
 make counsel; that the police refused his request to communicate
 with his parents; that if he had been allowed then he could have
 produced witnesses who would have testified that prior to his arrest
 he was not intoxicated and in the habit of holding liquor.

There is nothing before this court except the common law record and the petition. A nunc pro tunc order was entered, however, which is in the record, from which it appears that the court having examined the record and the memorandum made during the trial on January 5, 1934, was of the opinion that the record was incorrect in stating that the defendant was represented by counsel. The nunc pro tunc order further found that the defendant was not in fact represented by counsel at the time of the trial.

The Criminal Code of this State provides that every person charged with crime shall be allowed counsel, and if unable to procure one by reason of his pecuniary condition, counsel should be assigned by the court. Particularly, in our opinion, would this provision be compelling in the case of a minor.

This court in the case of City of Chicago v. Geraghty, 189 Ill. App. 90, held that it was an abuse of discretion to refuse a request by a defendant for a continuance in order for him to engage counsel. The averment in the petition to the effect that Sanoris was refused an opportunity to communicate with the outside world after having been arrested, would indicate a duress which, if known to the court at the time of the trial, might have resulted in a judgment different from that entered at the time. True it may be that some of the facts relied upon in the petition could have been raised at the trial, and probably would have been if Sanoris had been represented by counsel and had been granted a continuance.

We see no error in the action of the trial court^{and} for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

There is nothing before this court which would justify the reversal of record and the petition. I have the full order was entered, however, which is in the record, from which it appears that the court having examined the record and the proceedings made during the trial on January 5, 1934, and of the opinion that the record was correct in stating that the defendant was represented by counsel. The court also found further facts and the defendant was not in fact represented by counsel in the trial.

The Criminal Code of this state provides that every person charged with crime shall be allowed counsel, and it is the duty of the court, one by reason of his poverty, to assign counsel should he be assigned by the court. Furthermore, in our opinion, would this provision be applicable in the case of a minor.

This court in the case of State v. Campbell, 228 Ill. App. 30, held that it was an abuse of discretion to refuse a request by a defendant for a continuance in order for him to engage counsel. The statement in the petition to the effect that the state refused an opportunity to communicate with the state would state having been refused, would indicate a refusal which, it known to the court at the time of the trial, might have resulted in a judgment different from that entered at the time. Even if it may be that some of the facts relied upon in the petition would have been stated at the trial, and possibly would have been stated if counsel had been represented by counsel had been entered a continuance.

We see no error in the action of the trial court and that reason the judgment of the trial court is affirmed.

REVEREND JUSTICE

REVEREND JUSTICE

37787

PEOPLE OF THE STATE OF ILLINOIS, ex rel,
OSCAR NELSON, as Auditor of Public Accounts
of the State of Illinois,

Complainants,

v.

ROSELAND STATE SAVINGS BANK, a corporation,
Defendant.

FRANK C. LEVITON and LILLIAN H. LEVITON,

Intervening Petitioners,

Appellees,

v.

WILLIAM L. O'CONNELL, Receiver in Substitution
of GEORGE W. REINECKE, Receiver of the
Roseland State Savings Bank, a corporation,

Respondent, Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

281 I.A. 606³

Opinion filed June 26, 1935

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Frank C. Leviton and Lillian H. Leviton filed their intervening petition in the case of People of the State of Illinois, ex rel., Oscar Nelson, as Auditor of Public Accounts of the State of Illinois v. Roseland State Savings Bank, asking to have certain moneys in the hands of the bank declared a preferred claim. We are not provided with a clear exposition of the facts in the briefs, but from the pleadings in evidence as contained in the abstract, it would seem that on June 10, 1931, Lillian Leviton and Frank Leviton had on deposit at the Roseland State Savings Bank in two separate accounts the sum of \$934.55 and \$206.11. On June 10, 1931, Frank Leviton appeared at the bank in the City of Chicago and presented two pass books issued by the bank and showing the amount of these two deposits and demanded payment. He was informed by an officer of the bank that he could not have his money that day, but that they would accept a 60 day demand notice. Leviton thereupon filled out two forms of notice under protest. These notices were in duplicate and one copy was left at the bank and the other copy

PEOPLE OF THE STATE OF ILLINOIS,)
vs.)
OSCAR NELSON,)
of the State of Illinois,)

WILLIAM L. O'NEAL,)
vs.)
OSCAR NELSON,)
of the State of Illinois,)

FRANK C. LEVISON and WILLIAM L. LEVISON,)
vs.)
OSCAR NELSON,)
of the State of Illinois,)

WILLIAM L. O'NEAL,)
vs.)
OSCAR NELSON,)
of the State of Illinois,)

WILLIAM L. O'NEAL,)
vs.)
OSCAR NELSON,)
of the State of Illinois,)

WILLIAM L. O'NEAL,)
vs.)
OSCAR NELSON,)
of the State of Illinois,)

WILLIAM L. O'NEAL,)
vs.)
OSCAR NELSON,)
of the State of Illinois,)

Opinion filed June 26, 1935

MR. JUSTICE KILPATRICK delivered the opinion of the court.

FRANK C. LEVISON and WILLIAM L. LEVISON filed their in-

tervening petition in the case of People of the State of Illinois,

ex rel., OSCAR NELSON, as holder of public accounts of the State

of Illinois v. WELLS FARGO BANK, asking to have certain

monies in the hands of the bank declared a preferred claim. He

was not provided with a clear exposition of the facts in the petition,

but from the findings as contained in the report,

it would seem that on June 10, 1931, WILLIAM LEVISON and FRANK

LEVISON had an account at the WELLS FARGO BANK in two

separate accounts for sums of \$234.33 and \$25.11. On June 10, 1931,

FRANK LEVISON requested the bank to the City of Chicago and re-

ceived two checks issued by the bank and depositing the amount of

these two deposits and demanded payment. He was referred by an

officer of the bank that he could not have his money that day, but

that they would accept a 60 day demand note. LEVISON thereupon

filled out two forms of notice under protest. These notices were in

duplicate and one copy was left at the bank and the other was

281 I.A. 806

retained by Leviton. Subsequently, on July 1, Leviton went to the bank and had the interest then due entered on the pass books. It is not clear from the evidence whether or not any demand was made after the expiration of the 60 days.

August 14, 1931, the bank was found to be insolvent and one George W. Reinecke was appointed receiver. Apparently during the course of the litigation Reinecke was removed and the People of the State of Illinois, ex rel., Oscar Nelson, as Auditor of Public Accounts of the State of Illinois was placed in charge of the insolvent bank.

The intervening petition of the Levitons was referred to the master in chancery before whom the main cause was being heard and a finding entered by the master to the effect that the Levitons were entitled to a preferred claim against the bank. This recommendation, over objection, was concurred in by the chancellor and an order was entered directing William L. O'Connell, the present receiver, "to pay to the petitioners in full of the claims and demands set forth in said petition, the sum of \$1,140.66, in due course of administration, out of the funds in his hands as such Receiver as a preferred claim." The order itself is erroneous inasmuch as the receiver is directed to pay a specific amount, whereas this amount should be prorated with other preferred claims. Inasmuch as the entire claim will have to be disallowed as a preferred claim, it will be unnecessary to discuss at length the order itself.

The same question as that involved here was before this court in the case of People of the State of Illinois, ex rel Nelson v. First Italian State Bank, on appeal of Matteo and Angela Pennisi, Claimants, Gen. No. 36884. In that case the Pennisis had on deposit with the First Italian State Bank, in a savings account, certain sums of money for which they made a demand for payment. This was refused by the bank on the ground that they could not withdraw their

deposit until after the expiration of 60 days. Subsequently, and after the expiration of the 60 days, the Pennisis again demanded payment of their deposit and were again refused. The Italian State Bank having been declared insolvent, the Pennisis, as in this case, intervened and asked that their claim be declared preferred. This court found that the claim was not a preferred claim, but that the Pennisis occupied only the position of a general creditor. This court in its opinion, said:

"We are of the opinion that neither by the presentation of a check in person by the depositor, nor by a demand made through the presentation of a draft by a drawee bank upon a depository bank and refusal to pay, is the amount segregated from the general fund or the deposited money made a trust fund separate and apart from the general assets; that such act of the debtor in refusing to pay would justify the creditor in maintaining an action to recover the amount due and to participate as a general creditor in the funds of the bank."

It does not appear that the funds on deposit in the name of the Levitons was a trust fund and under the rule of stare decisis this court is bound by its opinion in the case of People of the State of Illinois, ex rel., Nelson, v. First Italian State Bank, on appeal of Matteo Pennisi and Angela Pennisi, supra. A petition for a writ of certiorari in the Pennisi case was denied by the Supreme Court and it therefore stands as the law of the case in so far as this court is concerned. The writer of the opinion in the case at bar dissented from the views expressed in the majority opinion in the Pennisi case for the same reasons as those presented here in the briefs filed by the Levitons, namely, that after a demand was made on the bank and a refusal to pay, the money was held ex maleficio, and it thereby became by implication a trust fund. The views expressed in the majority opinion, however, are controlling and, for the reasons expressed in the Pennisi case and for the reasons expressed in this

opinion, the decree of the Circuit Court is reversed and the cause remanded with directions to deny the prayer of the intervening petitioners.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HEBEL, P.J. AND HALL, J. CONCUR.

opinion, the Bureau of the Society should be prepared to receive and discuss
 requests with attention to help the Society in its activities.

Respectfully,

JOHN H. HARRIS, JR.
 Secretary

RECEIVED, 1.1. AND HALL, 1.1. 1900.

37897

JENNIE GLANZ,

Plaintiff-Appellant,

v.

JAMES T. FULKER and ALBERT J. HORAN,
Bailiff of the Municipal Court of
Chicago,

Defendants- Appellees.

25
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

231 I.A. 606⁴

Opinion filed June 26, 1935

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

James T. Fulker obtained a judgment in the Municipal Court of Chicago against Louis D. Glanz in the sum of \$1,502.88 and costs. Glanz was the husband of Jennie Glanz, the plaintiff in this suit. An execution issued out of the office of the Clerk of the Municipal Court and returned no part satisfied. An alias execution issued and was placed in the hands of the bailiff of the Municipal Court with directions to levy upon the goods and chattels in the apartment of Louis D. Glanz, the husband of the plaintiff here. Levy was made and the goods and chattels in question seized. Plaintiff brings this action alleging that the goods and chattels levied upon belong to her and not to her husband, Louis D. Glanz, the judgment debtor.

The goods seized consisted of, to-wit: 1 overstuffed chair; 1 pedestal and marble bust; 1 piano; 1 lamp and 1 table; 2 five-piece bedroom sets; 1 twelve piece dining room set; 1 hall clock; 1 six-piece coffee and tea set; 1 floor lamp; 1 statuette; and 1 console table, valued at \$350.00.

The plaintiff testified that the 2 bedroom sets and the dining room set levied upon had been bought about 11 years previous to the time of the execution and that the purchase was made from a sum of \$1,000.00 which had been given to her by her father. In this she is corroborated by her sisters, Emma A. French and Josephine O. Berg. Plaintiff further testified that the overstuffed chair was

purchased at the same time and in the same manner, and that the piano and the six-piece coffee and tea set were given to her as a gift. The gift of the piano had been made 30 years previous. The table described in the levy, according to plaintiff's testimony, had belonged to her father and she had taken it from his home and the lamp had been given to her as a birthday present many years ago. The hall clock had been given to her by her husband as a birthday present 15 years previous to the execution and the six piece coffee and tea set was a present given to her by her husband over 8 years before the entry of the judgment. The floor lamp was given to her by her sister and plaintiff states she bought the statuette in Italy. The pedestal and marble bust had been bought for her by her husband 20 years before. The little statuette was bought by her out of her own money. The coffee table had been a gift which she possessed over 30 years.

There was no further testimony other than that of the plaintiff and her sisters.

The judgment in this case ran against the husband alone.

Defendant relies upon the statute, Chapter 68, Section 9, Smith-Hurd's Illinois Revised Statutes, 1931, providing that transfer of property between husband and wife living together must be in writing, acknowledged and recorded in the same manner as a chattel mortgage, or third persons will not be bound.

According to the testimony of plaintiff the bedroom sets and dining room set were purchased with money given her by her father, so that the statute had no application. Gifts from husband to wife convey title to the wife and become her own separate property. There is no reason in law why a husband cannot make gifts to his wife which are valid, regardless of the statute, unless the gift is made to defraud creditors. This statute refers particularly to the transfer

of an interest in business, real estate, bonds and such evidences of indebtedness, as would indicate an intent to defraud creditors. In this connection, the time when the transfer is made, the solvency or insolvency of the transferor and the amount involved, enter into the consideration. Bishop v. Rowe, 211 Ill. App. 514; Eden v. Bohling, 69 Ill. App. 307. No such situation is found from an examination of the record in this case. The gifts of the chattels and personal property to the wife by the husband were of such character and made so long before the entry of the judgment as to preclude any possibility of fraudulent intent.

There is no evidence as to when the husband became indebted to the defendant, but certainly it could hardly have been prior to the making of the gifts in question. Husband and wife, can make gifts one to the other without requiring evidence of transfer in writing, so long as such gifts are of the character of those shown by the evidence in this case.

The Municipal Court in our opinion was in error in finding for the defendants Fulker and Horan, Bailiff of the Municipal Court. No good purpose would be accomplished in sending the cause back for a new trial and, for that reason, the judgment of the Municipal Court is reversed and judgment is entered here for the plaintiff Jennie Glanz, and the bailiff is directed to return the property to the plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL, P.J. AND HALL, J. CONCUR.

of an interest in real estate, which interest, under the laws of Tennessee, is deemed an interest in real estate. In this connection, the fact that the interest is made, and conveyed or assigned by the transferor and the transferee, under the laws of the jurisdiction, is immaterial. Shannon v. Jones, 101 Ill. 400, 41 Ill. 400.

Holding, 101 Ill. 400, 41 Ill. 400, no error shown in going from an examination of the record in this case. The gift is not absolute and personal property to the gift by the transferor was in such character and made so long before the death of the transferor as to constitute any possibility of fraudulent intent.

There is no evidence as to when the interest was made in this case. It is certainly not certain that it was made prior to the death of the transferor. The gift is not absolute. Making the gift, can make gifts one to the other without resulting evidence of transfer in writing, so long as such gifts are of the character of those shown by the evidence in this case.

The Municipal Court in this case was in error in finding for the defendant. The Municipal Court, in finding for the defendant, for the defendant's failure to show, in this case, that the gift was made prior to the death of the transferor, is finding the same as if for a new trial and, for that reason, the judgment of the Municipal Court is reversed and judgment is entered here for the plaintiff. The Municipal Court is directed to return the property to the plaintiff.

REVEREND JUDGE OF THE SUPREME COURT.

REVEREND JUDGE OF THE SUPREME COURT.

37931

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

LOUIS D. GLANZ,

Plaintiff in Error.

26
ERROR TO

7
MUNICIPAL COURT

OF CHICAGO.

281 I.A. 606⁵

Opinion filed June 26, 1935

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court to review a judgment of that court in which the defendant was found guilty of practicing law without a license and fined \$100.00 and costs. The original information was unverified and charged that the defendant did on the 31st day of January 1934, in the City of Chicago, unlawfully practice law. This information was quashed on motion, but leave was given to file an amended information, in which it was charged that the defendant on the 30th day of August, 1932, wilfully and unlawfully drew the last will and testament of one Johannes Frank Helm and gave legal advice to said testator concerning the same. This amended information was filed July 24, 1934, more than two years after the commission of the alleged offense. It is insisted as error that this amended charge was subject to the defense of the statute of limitations, inasmuch as over 18 months had elapsed between the date of the act on August 30, 1932 and the date of the filing of the amended information on July 24, 1934.

It is also insisted as a ground for reversal that there is no evidence that the defendant was practicing law within the meaning of the statute inasmuch as the evidence shows only one single isolated transaction and no evidenced as to a charge of any fee.

Wilhelmina Reimer, a daughter of the deceased Johannes Frank Helm, testified that Helm, died October 7, 1933; that she saw the defendant Glanz shortly after in his office; that she had a conversation with him, in which he said that he had her father's

STATE OF ILLINOIS
v.
LOUIS D. BROWN
Defendant in Error.

281 LA. 606

Opinion filed June 26, 1935

MR. JUSTICE ALTON

This is a writ of error to the Appellate Court to review

a judgment of that court in which the defendant was found guilty

of practicing law without a license and fined \$100 and costs.

The original information was verified and returned to the court

did on the first day of January 1935, in the City of Chicago, under

fully practiced law. This information was returned on motion, and

leave was given to file an amended information, to which it was

charged that the defendant on the said day of January, 1935, wilfully

and unlawfully drew the last will and testament of one Benjamin

Frank Helm and gave legal advice as said testament concerning the

same. This amended information was filed July 16, 1935, upon which

two years after the commission of the alleged offense, it is

insisted an error that this amended charge was subject to the defense

of the statute of limitations, inasmuch as over 10 months had

elapsed between the date of the act on January 20, 1935 and the date

of the filing of the amended information on July 16, 1935.

It is also insisted as a ground for reversal that there is

no evidence that the defendant was practicing law within the meaning

of the statute inasmuch as the evidence shows only one single isolated

transaction and no evidence as to a course of any kind.

Witnessing where, a member of the defendant's household

Frank Helm, testified that Helm, died October 7, 1935; that the

and the defendant always habitually acted in his office; that the day

will and that he had drawn up the will.

Samuel P. Gurman, a witness for the state, testified that he was a lawyer and represented Mrs. Reimer in the Probate Court and that he had a talk with the defendant in which the defendant stated that he had a lot of wills like the one in question and that this will was perfectly all right. This appears to be the only direct evidence in the case bearing on the question as to whether or not the defendant was in the habit of practicing law.

Helen Czech, a witness called by the state, testified that she was employed by the Glanz Mortgage Company, but that the defendant was not interested in that company; that defendant had an office in the same building; that she typed out the will at the request of Louis D. Glanz and that she signed the will at the request of the defendant as a witness.

The defendant testified that he did not dictate or prepare the will, but that he gave a memorandum to one Jacob Levy, a lawyer who was representing him in the trial of this case, and that Mr. Levy prepared the will in question and that he then gave it to Helen Czech to re-copy.

It is insisted on behalf of the state that the defendant could have had a corroboration of this testimony by calling Levy as a witness. The answer to this is obvious, inasmuch as the Supreme Court had condemned the practice of lawyers testifying as witnesses in cases where they represent one of the parties. On the other hand, the state or the court could have called Levy, as he was present in court, if it desired to test the statements of the defendant.

We do not believe that the statute was intended to cover a single, isolated transaction. An occasion frequently arises where it is impossible to get expert legal advice on the drawing of a will and courts have upheld wills prepared both by the maker and by others

will and that he had signed the will.

Samuel P. Brown, a witness for the will, testified that he was a lawyer and represented the will. Brown is the brother-in-law of the testator and that he had a long conversation with the testator in which the testator stated that he had a lot of other things in his mind and that this will was perfectly all right. Brown testified that he was present in the case bearing on the question of an admission of the testator was in the light of the testimony.

John Brown, a witness called by the state, testified that he was employed by the state witness company, but that the defendant was not interested in that company; that defendant had an office in the same building; that he was not at the request of Louis D. Brown and that the witness did not at the request of the defendant as a witness.

The defendant testified that he did not dictate or prepare the will, but that he gave a memorandum to one Jacob Levy, a lawyer who was representing him in the trial of this case, and that Mr. Levy prepared the will in question and that he then gave it to John Brown to receive.

It is insisted on behalf of the state that the defendant could have had a conversation with some witness by calling him as a witness. The answer to this is obvious, because the witness could not have been called as a witness at the trial. The witness had been called as a witness in cases where they were called as a witness. In the other hand, the state or the court would have called Levy, as he was present in court, if it desired to hear the statements of the defendant.

So do not believe that the state was intended to have a single, isolated transaction. In conclusion, the witness was not it is impossible to get a fair trial on the question of a will and cannot have had a fair trial by the state and by others.

at his request, where an opportunity of procuring expert advice is lacking.

There is no evidence that any fee was charged in connection with the making of the will, other than the fact that the defendant was named as a beneficiary therein. This could hardly be called the charging of a fee, inasmuch as the will might have been changed at any time in the future.

The cases cited by the State, namely, People v. People's Stockyards Bank, 344 Ill. 462, and People ex rel Courtney v. The Ass'n. of Real Estate Taxpayers of Illinois, 354 Ill. 102, shows a continuous practicing of the law over a long period of time. We do not think they are controlling in the case at bar.

The word "practice" as defined in the dictionary, is:

"To do habitually; exercise, as a profession * * *"

The rulings of the courts of this state, holding that the negotiation of a single sale for another is not in violation of the act providing for the licensing of real estate brokers, are applicable. It has been held repeatedly that a single transaction did not constitute the doing of a brokerage business in violation of the statute. Killen v. Irmiter, 233 Ill. App. 116.

The only evidence in the record indicating that the defendant had done other acts was the statement of the Attorney Gurman, namely, that the defendant had stated to him that he, the defendant, had lots of wills like that. This evidence does not definitely establish the fact that these wills had been prepared by the defendant at the request of others. It is so vague and uncertain as to be lacking in the quality of evidence upon which a conviction could be based. The action is criminal in its nature and the defendant would necessarily have to be found guilty beyond a reasonable doubt. There is no evidence in the record sufficient to support the judgment.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

HEBEL, P.J. AND HALL, J. CONCUR.

at his request, where an opportunity of presenting evidence is

allowed.

There is no evidence that the law changed in connection

with the making of the will, and that the fact that the defendant

was named as a beneficiary is immaterial. This would hardly be a valid law

changing of a law, however, as the will might have been made at

any time in the lifetime.

The words cited by the court, namely, "public v. private,"

"Stockholder's suit," 204 Ill. 48, and "public v. private," 204

Ill. 48, are not authority for the proposition that a stockholder

is entitled to a trial by jury in a stockholder's suit. It is

not that they are entitled to a trial by jury in a stockholder's suit.

The word "public" as defined in the dictionary, is:

"To be publicly; generally, as a profession." * *

The relation of the court in this case, holding that the

negotiation of a stock is a public act, and that the fact that the

negotiation is a public act, and that the fact that the negotiation is a public act, is not in violation of the

It has been held repeatedly that a single transaction and not several

transactions constitute a business in violation of the statute.

Ellis v. Illinois, 204 Ill. 48.

The only evidence in the record indicating that the defendant

had done other acts was the statement of the attorney general, namely,

that the defendant had acted as a stockholder, and that

of this fact alone. This evidence does not sufficiently establish the

fact that these wills were made by the defendant in the exercise

of power. It is no more than a question as to the location of the power.

Of witness upon this question would be asked. The action is

original in its nature and the defendant would necessarily have to be

found guilty beyond a reasonable doubt. There is no evidence in the

record sufficient to establish the defendant's guilt.

The law requires that in such cases, the judgment of the

33127

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

vs.

GARY CAMPBELL,
Plaintiff in Error.

271
ERROR TO CRIMINAL COURT
OF COOK COUNTY.

281 I.A. 607¹

MR. PRESIDING JUSTICE MCHURLEY
DELIVERED THE OPINION OF THE COURT.

Defendant was charged with receiving two bicycles knowing they had been stolen, and unlawfully for his own gain and to prevent the owner from again possessing them; upon trial by a jury he was found guilty and sentenced to the House of Correction for eight months and fined \$1.00. By this writ of error he seeks a reversal.

Defendant argues the indictment should have been quashed on the ground that it failed sufficiently to describe the bicycles alleged to have been stolen; that the indictment should have set out the make of bicycle, the type, whether boy's or girl's, and their numbers.

The indictment was drawn in accordance with the language of section 239 of the Criminal Code, par. 807 (Cahill's Statutes) and sets out substantially all the elements of the offense. If the defendant was not advised as to the identity of the property he could have moved for a bill of particulars. This he failed to do. The evidence shows that defendant knew the identity of the bicycles in question and had prepared his defense accordingly.

A much more serious question is whether the defendant knew at the time he received the bicycles that they were stolen. It is well settled that guilty knowledge on the part of the accused is essential to the crime of receiving stolen property.

Defendant testified that at the time of the occurrence he was conducting a bicycle shop on Ashland avenue for repairing locks and vacuum sweepers, and also renting bicycles; that he had been operating it for about three years; that he had eighteen

bicycles for rent - ten LaMalle bicycles which he bought from the Chicago Cycle Company, and five Hascots which he bought from Wieboldts, an Elgin which he bought from Robert Hannus, and two Pathfinders, which are the bicycles in question. His bicycle rental business consisted of putting his bicycles on the sidewalk and renting them to persons for twenty-five cents an hour.

About the middle of August he bought the Elgin bicycle from Hannus. About ten days thereafter Hannus came in with two other boys who had the two Pathfinder bicycles for sale; he inquired of Hannus as to who owned the bicycles and Hannus said these two boys were the owners and that they were his cousins; defendant asked Hannus if the boys were all right and Hannus answered, "sure" and vouched for them. Defendant was of the opinion the two bicycles were worth about \$15, as they needed repairing; he paid the boys \$15 for them, and with a helper worked for about half a day to put them in good condition; they were then put on the sidewalk with the other bicycles for rent; about four days or a week later they were repainted to match the rest of defendant's bicycles, all of which were red and white. Defendant denied that the numbers were altered or changed in any way; he says he did not know the two Pathfinders were stolen until some days afterward.

Francis Mathews testified that he was a helper of defendant, working in his bicycle shop; that he saw the two Pathfinder bicycles; that the wheels were out of line, spokes missing, and nearly all the spokes needed tightening, the fork in front of the frame was bent and sprung and the paint dull and weather beaten; that he repaired them and about one week later they were repainted red and white. The witness testified as to considerable experience in selling bicycles and gave it as his opinion that the customary price for the Pathfinders in the condition they were in would be \$8 to \$10 for one and \$6 or \$7 for the other; that the numbers on the bicycles were not

business conducted in various tin shops in the district was
estimated to amount to between the sum of £100,000 and £150,000.
The tin trade is the principal source of revenue to the
Government of the Federated Malay States, and the tin
mines are the principal source of revenue to the
Government of the Federated Malay States.

[illegible][illegible]

tampered with.

Leonard Veenstra testified that he and Mack Winner conducted a bicycle renting store, and on August 21, 1934, they rented the two Pathfinder bicycles to two boys; that the bicycles were not returned. The Pathfinder bicycles in question were identified as belonging to Veenstra and Winner, partners. Veenstra testified that he did not know how the bicycles got into possession of defendant.

There was no direct or positive proof that defendant had knowledge that the bicycles were stolen, but the State argues that it was a reasonable inference from the facts and circumstances that he had guilty knowledge; that the two boys were minors and that when Hannus brought them to defendant's shop Hannus told defendant that they wanted to sell their bicycles because all three of them were buying an automobile. While the circumstances may arouse a suspicion of guilty knowledge on the part of defendant, yet they fall short of convincing beyond a reasonable doubt that he knew they were stolen.

The State argues that the jury could consider also the previous transaction between defendant and Hannus and from that transaction and the circumstances attending the purchase of the Pathfinder bicycles conclude that defendant knew the bicycles were stolen.

As part of its case in chief the State introduced Robert Hannus, who testified that on August 16th he saw an Elgin bicycle in the back yard of an apartment building; that he did not know whose it was; that he took it and rode it away; that he stopped at defendant's shop and asked him if he wanted to buy a bicycle; defendant asked whose it was and Hannus said it belonged to him; defendant inquired if he had any proof of this and offered to go home with Hannus to confirm the claim of ownership in Hannus; Hannus told defendant no one was at his home; Hannus said he would get his mother's permission to sell the bicycle and the following morning returned and sold

temporarily with.

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it for \$15; that when he sold it he signed a paper but put a "phoney" name and address on it. Mannus admitted he had stolen the Elgin bicycle and had served time in the county jail for the theft. The evidence as to this transaction with Mannus was admitted over the objection of defendant's counsel.

Defendant testified in detail as to the transaction with Mannus; that he insisted that Mannus produce proof of ownership from his mother; that when Mannus returned the next day he informed defendant that he could not persuade his mother to come to the shop; defendant had a customer in the store at the time named Leo Cordell, and defendant inquired of him if he knew Mannus; Cordell vouched for Mannus, saying he knew him and he was all right, and that relying on this defendant had Mannus sign a writing evidencing the purchase of the Elgin bicycle. He did not know the Elgin bicycle had been stolen when he bought the Pathfinder bicycles. He first knew this when told by the police officer on September first.

The evidence as to the purchase of the Elgin bicycle from Mannus was incompetent and its admission was reversible error. In People v. Gotler, 311 Ill. 387, the court says it is settled by repeated decisions that in prosecutions for receiving stolen property, to show guilty knowledge it is competent to prove that the accused had on other prior occasions received stolen property from the same thieves, and in People v. Kohn, 290 Ill. 410, it is held competent, as tending to show guilty knowledge, to show that the accused had on former occasions received stolen property "through the same channels." The alleged owners of the Pathfinder bicycles were not Mannus but two other boys. Evidence of prior similar transactions are competent only when the defendant receives the stolen property from the same party or parties.

It was also improper to receive the evidence of Dorothy

Moore, who testified that she owned the Elgin bicycle stolen by Hannus. She was permitted to describe the condition of the bicycle and to say that it was returned to her by police officers. There was also testimony by police officers as to the Hannus transaction, all of which was prejudicial and incompetent.

It might be said that the evidence of both Hannus and the defendant as to the purchase of the Elgin bicycle tends to exonerate the defendant from having guilty knowledge that it was stolen. But the manner in which the transaction was presented to the jury and the admission by Hannus of the theft could not fail to be harmful to the defendant.

We are of the opinion the State's Attorney in his argument to the jury made statements highly prejudicial to the defendant. He argued to the jury that the defendant had said he spent ten years in New Orleans and worked the entire time he was there. The State's Attorney continued and said, "Did you notice his face when I showed him People's Exhibit 3, to refresh his memory? He was going to tell you anything in this court room. He did not know we had information about him when he was down in New Orleans. Did you notice his face when I showed him People's Exhibit 3?" Plaintiff's exhibit 3 was not in evidence. Neither was there any evidence that the State's Attorney's office or anyone else had any information about the defendant when he was in New Orleans. Indeed, there is no evidence that defendant ever was in New Orleans, although there is in evidence that he was in business in Georgia for nine or ten years. The argument of the State's Attorney was built upon a premise which had no basis in the evidence. The jury would draw the conclusion that "People's Exhibit 3" contained something damaging to defendant evidenced by the expression on defendant's face when shown the document. The argument was highly improper and tended to create in the minds of the jury a prejudice against the defendant. It is

always improper for counsel in argument to assume or state as facts matters not in evidence and base an argument thereon. People v. McMahon, 244 Ill. 45; Fox v. People, 95 Ill. 71; People v. McComb, 274 Ill. 600.

Defendant complains with reference to the instructions.

No objections or exceptions were made to the giving of the instructions and counsel for defendant did not specifically point out any matters in connection therewith. Section 67 of the Civil Practice Act provides for objections or suggestions to instructions, and by Rule 27 of the Supreme court it is provided that the court in criminal cases shall instruct the jury in accordance with section 67 of the Civil Practice Act. People v. Mizzano, 360 Ill. 446.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett and O'Conner, JJ., concur.

38135

AGNES HAGGERTY, Administratrix of
the Estate of PATRICK HAGGERTY,
Appellee,

vs.

BEN HANSEN, also known as BENJAMIN
HANSEN,
Appellant.

28 H
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

281 I.A. 607²

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Patrick Haggerty, hereafter called plaintiff, was struck by an automobile owned and driven by defendant and died as a result of the injuries received; his administratrix brought suit and upon trial had a verdict and judgment for \$5000, which defendant seeks to have reversed.

The facts are fairly simple. The accident occurred December 27, 1932, at about 11:45 P. M., at Cicero avenue, which runs north and south, and at or near the intersecting east and west street, Dickens avenue, in Chicago. Defendant was driving his automobile north on Cicero avenue, the right wheels being about a foot east of the east rail of the northbound street car tracks on Cicero; it was a clear night; at the northeast corner of Dickens and Cicero was a lighted 600 watt lamp. A witness testified that it was sufficiently light for one to see a human being for one hundred feet on the street. There was no other vehicle or any obstruction of sight to the north. Plaintiff was apparently walking from the east side of Cicero toward the west, at or near the north cross-walk of Dickens avenue; when about fifteen and a half feet west of the east curb of Cicero, he was struck by defendant's automobile, thrown some distance to the north and was picked up about forty-eight feet north of the north cross-walk; the collision broke or bent the right front headlight and dented the right fender of the automobile.

According to the testimony of the defendant he was approach-

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THE UNIVERSITY OF CHICAGO

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remains in effect until the 1993 election.

ing the intersection at about thirty miles an hour and did not see plaintiff until he was within ten or fifteen feet from him. Plaintiff was taken to the hospital and died the next morning. A witness driving south on Cicero avenue just before the accident testified that he saw a man on the sidewalk on the east side of Cicero on the northeast corner, at the north cross-walk of Dickens.

The declaration alleged general negligence and also wilful and wanton negligence, and defendant argues that there was no evidence of wilful and wanton misconduct on the part of the defendant. What conduct amounts to wilful and wanton negligence has been the subject of discussion in many cases. As was said in Bernier v. Illinois Central R. R. Co., 296 Ill. 464, "It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a wilful or wanton act. Whether an act is wilful or wanton is greatly dependent upon the particular circumstances of each case." Without citing the numerous cases in point, we find in Brown v. Illinois Terminal Co., 319 Ill. 326, probably as clear a statement as can be found. It was there said, "A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care." (Citing cases.)

The instant case, therefore, presents the question whether the defendant so drove his automobile as to exhibit a reckless disregard for the safety of others, and did he fail to discover the danger to plaintiff through recklessness or carelessness when it could have been discovered had defendant exercised ordinary care. The Brown case and many others say that whether the injury is the

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result of wilful and wanton conduct is a question of fact to be determined by the jury from all the evidence, and that a motion to direct a verdict on this count should be allowed only where there is no evidence tending to support the charge of wilful and wanton misconduct.

The jury could properly believe that as defendant approached the cross-walk at Dickens avenue he should know that a pedestrian might attempt to cross; that there was sufficient light to enable the defendant to see such pedestrian in ample time to avoid hitting him. There was no obstruction to defendant's vision. Plaintiff was seen by another driver more than a block away, yet defendant failed to see him until he was only ten or fifteen feet from him. We cannot say that the jury's conclusion that this conduct of defendant was wilful and wanton negligence is against the manifest weight of the evidence.

It does not excuse defendant to assert that as soon as he saw plaintiff he did everything possible to avert the accident. Defendant's negligent failure to be on the watch for pedestrians at the street crossing cannot be excused by his efforts at the last minute to avoid striking the pedestrian. In People v. Camberis, 297 Ill. 455, it was held that one who carelessly drives an automobile unintentionally over another and kills him may be guilty of homicide, although as soon as he sees a pedestrian in danger he makes every effort to avoid injuring him, provided that the driver's prior recklessness was responsible for his inability to prevent the accident. See also Bremer v. L. E. & W. R. R. Co., 318 Ill. 11.

Gannon v. Kiel, 252 Ill. App. 550, involved facts very similar to those in the instant case. There Mildred Kiel, the plaintiff, was struck at a street crossing by an automobile driven by the defendant, who claimed he did not see the plaintiff until his automobile struck her, and that while his conduct was negligent it did not amount to wilful and wanton negligence. The court

held against this position, saying that it was the clear duty of an automobile driver to have regard for the existing conditions at the place where an injury may occur; that it was his duty to be on guard at a street intersection where pedestrians might be crossing. The court said:

"It was peculiarly the province of the jury to determine, under all of the circumstances, whether he was guilty of such a degree of negligence as could be said to be wilful or wanton. Failure to discover danger through recklessness or carelessness, when it could have been discovered by the exercise of ordinary care, may oftentimes be considered wilful or wanton negligence. See Brown v. Illinois Terminal Co., *supra*, and Froom v. Meyler, 245 Ill. App. 392, where many decisions of our courts are quoted and commented upon in reference to the duties and obligations of drivers of automobiles upon the public highway. In view of these decisions and the facts in this record, we are of the opinion that the evidence supports the finding of the jury that the defendant was guilty of wilful or wanton negligence."

If defendant was guilty of wilful or wanton negligence, contributory negligence of plaintiff, if any, does not bar a recovery. However, we are unable to say as a matter of law that plaintiff was guilty of contributory negligence, and it was for the jury to determine this question from all the surrounding conditions.

Defendant complains of instructions given by the court, but the abstract gives only two of the twenty-nine instructions given.

It has been repeatedly held that errors in instructions will not be considered on appeal unless all the instructions, both given and refused, are fully set forth in the abstract. Madison v. Wedron Silica Co., 352 Ill. 60.

Complaint is made of the remarks of counsel for plaintiff in argument to the jury, but we find nothing of sufficient importance to justify a reversal.

The case involves only a question of fact and was properly submitted to the jury, and this court cannot say that its verdict is against the manifest weight of the evidence. The judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

38014

ACORN BUILDING AND LOAN
ASSOCIATION, a Corporation,
(Plaintiff)
Appellant,

vs.

ADAMS STATE BANK, a Corporation,
(Defendant)
Appellee.

297
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

231 I.A. 607³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

June 31, 1931, plaintiff brought an action of trover against the defendant claiming defendant had converted six of plaintiff's checks aggregating \$3212.22. April 12, 1933, plaintiff filed an amended declaration by adding another check for \$6,000 which defendant was charged with having converted to its own use. There was a jury trial September, 1933. At the beginning of the trial plaintiff dismissed the action as to all of the checks except one for \$6,000. The jury returned a verdict in favor of defendant; afterward the verdict was set aside, and a new trial awarded. There was a second trial in April, 1934, when the jury again returned a verdict for defendant; judgment was entered on the verdict and plaintiff appeals.

The record is much confused. The abstract is not prepared according to Rule 6 of this court, which provides that "the evidence shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance." A reading of the abstract tends to confuse. Throughout the trial counsel for plaintiff made almost constant objections, a great many of which were frivolous and wholly unwarranted; nor was counsel for defendant entirely free in this respect. A great many of the objections were erroneously sustained. The court should have brushed most of them aside and admitted the evidence. Where constant objections are permitted, as in the instant case, the testimony of witnesses is rendered unin-

telligible. The purpose of a trial is to elicit the facts about the matter in controversy, so that the truth may be determined by the jury. This result is often frustrated by erroneously sustaining frivolous objections, many of which are wholly unwarranted; and while the record is confused (which was brought about principally by counsel for plaintiff) yet we are able to gather the essential facts in the matter in controversy.

The evidence shows that plaintiff is a building and loan association, carrying on its business in Oak Park, Illinois, and on September 13, 1926, drew its check on the Avenue State Bank of Oak Park, Illinois, payable to the order of Charles Spalenka and Anna Spalenka, for \$6,000. The check was signed by the building and loan association by John O. Eastear, its president, Alva H. Thomas, its secretary, and countersigned by F. W. Creighton, its treasurer. The check bore the following endorsements: "The undersigned hereby acknowledges the receipt of money as payment in full as described below, from the Acorn Building & Loan Ass'n. Book No. 1212, Certificate No. 1212, Series 14, Share 60, Class A, *** Real Estate Loan \$6,000.00." The names of the payees are written also on the back of the check and underneath is stamped the name, John O. Eastear. And while neither the evidence nor the argument in the briefs is clear, we think that the check was deposited by Eastear in his account in the Adams State Bank of Chicago (defendant) and paid by it in the regular course of business through the Chicago Clearing House.

The theory of the plaintiff seems to be that the payees of the check, Charles Spalenka and Anna Spalenka, his wife, never knew anything about the check, never borrowed the \$6,000 from the plaintiff building and loan association, never endorsed the check, that their names on the back of the check were forgeries, and that John O. Eastear, president of the building and loan association, used this method of fraudulently obtaining \$6,000 of plain-

tiff's money, which he did by depositing the check in his personal account in the defendant bank.

On the other hand, the theory of defendant seems to be, as shown by the evidence and instructions which the court gave at its request, that the Spalenkas borrowed the \$6,000 from the building and loan association, and to secure the payment of it gave a mortgage on a piece of real estate owned by them; that afterward the mortgage was foreclosed; and that the Spalenkas also executed their warranty deed for the premises covered by the mortgage, conveying it to plaintiff in satisfaction of the loan. Defendant further says that in 1924, two years before the making of the check and trust deed above mentioned, the Spalenkas borrowed \$4,000 from the building and loan association and secured its payment by giving a mortgage on the same property, which loan was afterward paid.

The records of the building and loan association were offered in evidence, from which it appears that a committee of the building and loan association examined the property for the purpose of valuing it prior to making the \$4,000 loan and mortgage; that the loan was approved, the money paid, and a mortgage given securing it; that afterward the Spalenkas paid the \$4,000 mortgage, and in 1926 applied for a \$6,000 loan on the same property. The trust deed, which purports to secure the \$6,000 loan, was introduced in evidence and a photostatic copy is in the record. This purports to have been made by Charles Spalenka and Anna Spalenka, his wife, conveying the premises to the building and loan association to secure the payment of the \$6,000.

Plaintiff called Spalenka, who testified that the signatures of himself and wife to the trust deed were forgeries; that their signatures on the back of the \$6,000 check were also forged; that their signatures on the warranty deed were also forged; that neither he nor his wife ever owned the property on which the trust deed was

little money, when he was reported to have been in his possession
amounted in the neighborhood of \$10,000.

On the other hand, the report of the witness is that, as
shown by the evidence and investigation with the money part of the
property, that the defendant received the \$10,000 from the defendant
and from the defendant, and in return the defendant of it with a note
made on a check of that amount which was given to the defendant the
defendant was defendant; and that the defendant was defendant then
without fail for the defendant of the defendant, defendant
it is definitely established at the time. Defendant further
was that in 1914, two years before the making of the check and
that that check was made, and defendant received it, and then
the building and land was defendant and defendant's property at that
a portion of the same property, which was defendant's property.
The records of the building and land established were as

first in evidence, from which it appears that a majority of the
building and land was defendant's property and the defendant
of evidence is given in making the \$10,000 from the defendant; that
the land was defendant, the money was, and a note was given defendant
for it; that defendant the defendant was in 1914, and defendant, was
in 1914, and for a \$10,000 from the defendant. The land
was, which property is shown in 1914, and defendant is
evidence and a photograph of the building. The property
to have been made by the defendant and the defendant, the wife,
conveying the property to the defendant and the defendant is
shown the record of the \$10,000.

Defendant's wife, defendant, was defendant and the defendant
of defendant and wife of the defendant were defendant; that fact
evidence on the part of the defendant was also found; that
that defendant on the defendant, defendant was also found; that defendant
he was the wife of the defendant and the defendant was

given and which was purported to have been conveyed by the warranty deed. There is also in the record a photostatic copy of a number of signatures of Charles Spalenka and Anna Spalenka, his wife, which were testified to as being genuine. These were put in for the purpose of permitting the jury to compare them with the other signatures which were said to be forgeries. These documents were all before the jury.

A witness was called who testified that he was an expert in handwriting, that the signatures endorsed on the back of the check were forgeries, and that the warranty deed had been altered and the signatures of the grantees forged. Most of the defendant's evidence was taken from the records of the building and loan association. The testimony of Charles Spalenka does not at all times appear to be straightforward. He testified that he never obtained any loan from the building and loan association until 1931; that he did not remember when he ceased to be a member of the association. The signatures on the documents which are admitted to be the genuine signatures of the Spalenkas, and the signatures on the other documents in the record which plaintiff contends were forgeries, appear to us to warrant the jury in finding, as they may have found, that the signatures on the back of the check were genuine and not forgeries.

The court instructed the jury on behalf of plaintiff that if they found from the evidence that the check was payable to the Spalenkas, not as fictitious payees, and that the check was not endorsed by the payees, Charles and Anna Spalenka, or their agents, the fact that the defendant bank paid full value for the check to some third person in good faith, and without notice that the endorsements were not genuine, would not protect the defendant from liability. On behalf of the defendant the court instructed the jury that if it found from the evidence that the signatures of

Charles and Anna Spalenka on the back of the check were genuine, then their verdict must be for the defendant.

One of the controlling questions in the case was whether the endorsements of Charles Spalenka and Anna Spalenka on the back of the check were genuine. If they were, then the verdict should be for the defendant. The jury might have found in effect that the signatures were genuine. They saw and heard the witnesses testify and compared the signatures of the Spalenkas which were admitted to be genuine with those which were claimed to be forgeries; and upon a careful consideration of all the evidence we are unable to say that the finding is against the manifest weight of the evidence. Two juries have passed on this question, and the verdict of the second trial has been approved by the trial Judge. In these circumstances, we think we would not be warranted in disturbing the verdict on the ground that it was not warranted by the evidence.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, F. J., and Katchett, J., Concur.

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33085

JOHN ZWACK,
Plaintiff in Error,
vs.

GEORGE L. APFELBACH,
Defendant in Error.

Filed June 28, 1935

304
COURT TO MUNICIPAL COURT
OF CHICAGO.

231 I.A. 607⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 9, 1932, plaintiff brought suit against defendant to recover \$625 which he claimed for rent at \$125 a month for July, August, September, October and November, 1932, under a claimed oral lease from month to month between plaintiff as lessor and Dr. George A. Schneider, since deceased, and the defendant who plaintiff claims were copartners. There was a trial before the court without a jury, and on February 6, 1933, a judgment in defendant's favor, and plaintiff sued out a writ of error from this court.

Plaintiff's theory of the case is that Dr. George A. Schneider and the defendant, Dr. George F. Apfelbach, were practicing physicians occupying premises for their offices as tenants of plaintiff; that the Doctors held themselves out as partners and therefore each was liable to plaintiff for the rent of the premises in question at a rental of \$125 a month. In this connection counsel for plaintiff say, "If a person suffer his name to be used in business, or otherwise hold himself out as a partner, he is to be so considered whatever may be the agreement between him and the other parties," and that the evidence shows that defendant permitted his name to be used in connection with that of Dr. Schneider as partners in the practice of their profession.

The evidence is to the effect that Dr. Schneider, for many years, leased from plaintiff five rooms in plaintiff's building at 755-757 West North avenue, Chicago, as evidenced by a written lease. The evidence further tends to show that the defendant, Dr. Apfelbach,

JOHN L. LAMBERT,
Plaintiff in Error,
vs.
GEORGE L. LAMBERT,
Defendant in Error.

231 A. 607

ALL JUSTICE OF THE PEACE IN THE COUNTY OF...

Subscribed and sworn to before me on the 24th day of June, 1935, at the County of...
I, the undersigned, being duly qualified, do hereby certify that the foregoing is a true and correct copy of the original as the same appears in my files and records.

Witness my hand and the seal of the County of... at the City of... on the 24th day of June, 1935.

Notary Public for the County of...
The witness herein named as being duly qualified, do hereby certify that the foregoing is a true and correct copy of the original as the same appears in my files and records.

and a Dr. Gordon, a dentist, subleased some of the rooms from Dr. Schneider. They paid their rent to Dr. Schneider who in turn paid the rent to plaintiff. The premises were thus occupied for a number of years. Some of the leases are in evidence, one dated August 12, 1924, covering a period of two years ending September 30, 1926, in which plaintiff is the lessor and Dr. Schneider the lessee. Another lease is in the record in which the same parties are named as lessor and lessee covering the premises in question for a period of two years ending September 30, 1928. Also a lease prepared by plaintiff covering the same premises for a period of two years, expiring September 30, 1932. In this lease plaintiff is named as the lessor and Dr. Schneider and Dr. Apfelbach as lessee, but it is not signed by either of them. There was also introduced in evidence a number of checks for \$125 signed by Dr. Schneider, payable to plaintiff. Cancelled checks are in the record in which the names Dr. Schneider and Dr. Apfelbach appear at the bottom as makers; the checks are signed by Dr. Schneider and countersigned by Dr. Apfelbach. One is for \$70 and the other for \$72.75.

Plaintiff also offered evidence to the effect that the names Dr. Schneider & Dr. Apfelbach appeared on the door to the office and that on October 28th, shortly after Dr. Schneider died, Dr. Apfelbach drew his check to plaintiff for \$9.05 in payment of plaintiff's bill which plaintiff made out to Drs. Schneider and Apfelbach. Plaintiff also introduced a letterhead on which appeared the names of Drs. Schneider & Apfelbach.

Dr. Apfelbach testified that he specialized in surgery and the interpretation of X-rays; that his general practice was at 645 Fullerton Parkway; that he became acquainted with Dr. Schneider in 1919; that the suite in question contained five rooms; that Dr. Schneider and Dr. Gordon each occupied one of the two front offices and he and Dr. Schneider did certain work together in the three rear

rooms; that the rent for the three rear rooms was \$70 a month, which amount apparently was agreed to between himself and Dr. Schneider; that Dr. Schneider rented the suite from plaintiff; that after plaintiff brought up the last lease which was not signed, to which we have above referred, "I went down and told him (Zwack) I didn't want to get on the lease and never signed a lease after that. I never paid him a cent personally;" that all his bills concerning the payment of rent were with Dr. Schneider and that he paid Dr. Schneider and Dr. Schneider paid the rent to plaintiff.

There is some other evidence in the record, but upon a careful consideration of all the evidence we are clearly of the opinion that it is wholly insufficient to warrant the court in finding that Dr. Apfelbach was a partner of Dr. Schneider and liable for the rent, or that he was held out as a partner of Dr. Schneider. On the contrary, we think the evidence shows that plaintiff leased the premises to Dr. Schneider and that Dr. Schneider sublet part of it to Dr. Apfelbach and another part to Dr. Gordon. There was no privity of contract between plaintiff and defendant, and the judgment of the Municipal court of Chicago, finding in favor of the defendant, was the only judgment that was warranted under the law and the evidence, and it is therefore affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

38128

ELLA FISH, as Administratrix
of the Estate of Marshall Joseph
Fish, deceased,

Appellee,

vs.

STERLING CASUALTY INSURANCE
COMPANY, an Illinois corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

281 I.A. 608¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on an insurance policy dated December 29, 1930, issued by defendant to Marshall Joseph Fish, by which it insured him, among other things, against "loss of time by disease." The policy provided that if the insured were confined to a hospital the insurance company would pay him after the first week \$37.50 for a period not exceeding ten weeks. Plaintiff became ill in January, 1932, was confined to the hospital for a short time, and then returned to his work, which was that of a switchman and yard conductor, but did not entirely recover and again became ill so that he had to stop work for most of the time after June 27, 1932. August 30, 1932, the insured's son advised the defendant that his father was about to go to hospital for an operation. At that time he was given two blanks to be filled out by his father and the attending physician, one of which is entitled, "Claimant's Preliminary Notice of Illness," and the other, "Final Proof for Illness." The father (the assured) and the physician who had been attending the assured during his illness, Dr. Peter A. Nelson, filled out the blanks showing the nature of the assured's illness and the time he had been under the care of the physician.

One of the questions in the blank entitled, "Final Proof for Illness" was, "What indemnities are you claiming?" and the answer was, "What policy calls for." The insured went to the hospital September 8th and remained there continuously until he died on

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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

2011.A.608

RE: JAMES EARL RAY, AKA; ALIASES; ET AL.

Primarily during an action on an indictment which dated
December 11, 1967, James E. Ray, known as defendant, was charged
by which it is charged that, during said action, certain items of value
by defendant. The following report is a summary of the information
to a hospital the defendant was taken to the night of the 11th
week 1967. On the 11th day defendant was taken to a hospital for
came ill in January, 1968, was admitted to the hospital for a short
time, and then returned to his home, where he died of a heart
and heart condition, the cause of which is being determined by the
all so that he died of a heart condition of the left side of
1968. August 11, 1968, the defendant was charged with the murder of
his father was charged as a defendant in a conspiracy. At that
time he was given two aliases as he filed and by his father and
the following explanation, and to which is attached, "Witnessing
Protestant Society of Illinois," and the alias, "James Earl Ray"
illness." The father (as mentioned) and the explanation of the same
attending the mother during his illness, Dr. Robert A. Brown,
listed and the blanks between the names of the defendant's illness
and the time he had been taken to the hospital.
One of the questions in the blank entitled, "What type of
illness" was, "What illness did you witness?" and the answer
was, "What illness did you witness?" The answer was in the blank
September 1968 and defendant's name was mentioned in the blank on

December 11th. It is for ten weeks of this period, at \$37.50 a week, or \$375, that plaintiff sues.

There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for the amount of her claim, and the defendant appeals.

Defendant's contention is that the judgment is wrong and should be reversed because neither the assured nor anyone for him gave written notice to the defendant of the assured's sickness, as required by the policy; that the policy required the assured to give written notice within ten days after the commencement of his disability or sickness; that plaintiff became ill in January but gave no notice until August 30th, which was an oral notice, not in accordance with the policy, and therefore no recovery could be had. Just why there should be so much argument about the oral notice given by the son on August 30th we are unable to understand, because at that time defendant gave the son the blanks for his father and the physician to fill out concerning the father's illness and claim, as above stated, and three days after this the blanks were filled out and returned to the defendant, showing the nature of the father's illness and the claim he was making. This of course was a written notice.

We think there is no merit in the defendant's contention that no recovery could be had under the policy because the assured failed to give defendant written notice ten days after the commencement of his illness; plaintiff is not seeking to recover for any claim she might have for the time plaintiff became ill in January and again in June, but is claiming only the \$37.50 a week for ten weeks after the assured had been confined in the hospital, of which defendant had been notified by the assured before he went to the hospital.

In deciding the case the learned trial Judge succinctly

December 11th, 1937, it is the first time in this country, as far as I know.

Week, at 1937, that is, the first time.

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stated his reason for deciding in favor of plaintiff. The court said, "the man might be totally disabled in April but does not give any notice until August, then for ten weeks following he is totally disabled he can recover for that because he did not give notice of the prior disability. *** the courts never have held that because you do not give notice at the time that the disability begins although it lasts for more than the fixed time of ten weeks, *** that that is a defense to it. They must give notice before that ten weeks."

We think there is no merit in the defense interposed either in the trial court or in this court.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

which is known to be of the highest quality.

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38138

OSCAR WEYMAN & BROTHERS, INC.,
a Corporation,

Appellee,

vs.

HIPP & COBURN CO., a Corporation,
Appellant.

391
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

281 I.A. 608²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 14, 1934, plaintiff brought an action against defendant to recover \$15,000 and interest thereon, which it claimed to have lent defendant July 7, 1930. The defense interposed was that the loan was not made to defendant corporation but was a personal loan to Frederick G. Hipp, treasurer of defendant. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for the amount of its claim, and defendant appeals.

The record discloses that for many years plaintiff was a manufacturer and wholesale dealer in jewelry in New York City and defendant corporation was engaged in the retail jewelry business in Chicago. Defendant had been a customer of plaintiff for many years. June 30, 1930, defendant was indebted to plaintiff in the sum of \$17,256.30 on an open account, and \$9,000 evidenced by defendant's notes. July 7, 1930, Frederick G. Hipp, defendant's treasurer, was in New York City transacting business with plaintiff.

Plaintiff's theory of what took place on that day is that Hipp talked to plaintiff's representatives at plaintiff's place of business, and stated that defendant was in need of some cash to operate during the dull summer season and would need \$15,000 for that purpose; that defendant would repay the loan after the Christmas holidays, and that he and Mr. Coburn, defendant's president, would give plaintiff two personal notes as

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collateral security for the loan; that plaintiff agreed to this and made out its check for \$15,000 to defendant's order, and at Hipp's suggestion mailed the check to defendant at Chicago; a few days thereafter, upon Hipp's return to Chicago, he and Ceburn executed their two notes for the \$15,000 payable to plaintiff's order, and mailed them to plaintiff in New York City. The evidence further shows that the notes were not paid when due, but were renewed from time to time by Hipp and Ceburn individually making out new notes. Hipp died in July, 1932, and no part of the principal of the notes having been paid this suit was brought February 14, 1934.

The defendant offered evidence to the effect that Hipp had some time prior borrowed from defendant company \$30,000 for which he had given it his two notes, one dated March 26, 1930, for \$10,000 payable six months after date, and one dated March 31, 1930, for \$20,000 due six months after date.

The evidence further shows that while Hipp was in New York in July, 1930, at which time plaintiff lent the \$15,000, he also borrowed \$15,000 from Charles W. Sommer & Brothers, Inc., a New York company; that upon receipt by defendant of the \$15,000 from plaintiff and the \$15,000 from the Sommer company, defendant surrendered to Hipp his two notes aggregating \$30,000, and his indebtedness to defendant was thereby paid.

The only question for decision on the trial was whether the \$15,000 was lent by plaintiff to the defendant corporation or to Frederick G. Hipp as an individual. Plaintiff's position is, obviously, that the loan was to the defendant corporation and that the two notes signed by Hipp and Ceburn individually, payable to plaintiff, were given to plaintiff as collateral security for the loan of the \$15,000. On the other side, defendant's position is that the \$15,000 was a personal loan to Frederick G. Hipp, for

which he gave his note signed by Coburn as surety.

Most of the evidence in the record is in writing, consisting in a great part of the books of both plaintiff and defendant. In addition to the written evidence, plaintiff called three witnesses who testified as to what was said by Hipp and plaintiff's President, Oscar Heyman, at the meeting in New York on July 7, 1930. From the testimony of these three witnesses - Nathan Heyman, Milton A. Helmlinger and Gladys Bernard - it appears that they and Mr. Hipp and Oscar Heyman, plaintiff's president, were present. Oscar Heyman was not called as a witness. The testimony of the three witnesses, as we have above stated, was in substance that Hipp stated defendant needed money and that plaintiff's president, Oscar Heyman, agreed that plaintiff would lend defendant \$15,000, which would be repaid after the Christmas holidays, and that Hipp would give plaintiff two notes as collateral security, which notes would be executed by himself and Coburn when he returned to Chicago; that at that time it was agreed plaintiff would mail the check for \$15,000, which was payable to defendant's order, to defendant at Chicago, and the letter enclosing the check is in the record. It is dated July 7, 1930, addressed to defendant corporation, Chicago, and in it is said: "As per arrangements with Mr. Hipp today, we are pleased to enclose herewith check, amount \$15,000, and we understand that he will be in touch with you by phone, making arrangements to settle our account as outlined." The check was received the next day by defendant and deposited in its bank.

Defendant called Mabel Frankel, who was defendant's bookkeeper and cashier at the time in question, and sought to elicit from her that on July 7th she had a telephone conversation with Hipp from New York, concerning the borrowing of the \$15,000 from plaintiff and the method in which she should make the entries in

defendant's books of account. Upon objection by plaintiff, she was not permitted to testify on this subject.

Coburn, defendant's president, testified that the day after Hippi's funeral he had a talk with Louis Heyman, vice president of plaintiff company, at defendant's place of business in Chicago, in which the witness stated he wished he had the \$15,000 to pay plaintiff Hippi's \$15,000 note which the witness had endorsed, but that he did not have the money; that witness stated Hippi had not left a cent and had no property except some very small insurance policies; that at that conversation Mr. Sommer, who presumably was of the Charles W. Sommer & Brothers New York corporation, was present.

There is further evidence to the effect that all interest that was paid on the \$15,000 was paid plaintiff personally by Hippi and not by the defendant company; and that plaintiff on December 31, 1932, which was about six months after Hippi's death, charged the amount then due on the \$15,000 loan to "bad debts." There is considerable other evidence in the record which throws light on the transaction as to whether the loan was made to the defendant company or to Hippi individually, but since we have reached the conclusion that there must be a new trial we do not mention it here.

At the close of all the evidence counsel for plaintiff made a "motion for finding of fact and judgment," and submitted the following in writing: "1. The court finds, from the evidence, as a matter of fact, without taking into consideration the testimony of any witness or witnesses who testified concerning a conversation between Frederick G. Hippi and Oscar Heyman and/or Nathan Heyman, on July 7, 1930, that the plaintiff on July 7, 1930, loaned to the defendant \$15,000.00, which was received by and used by the defendant for its own use and benefit; that said loan was made on the credit of the defendant and that the notes aggregating

Information is being provided to the public by the Department of the Interior, Bureau of Land Management, in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552.

of the United States, and the Government, and
the people, are all interested in the
well-being of the country; and it is
the duty of every citizen to do his
part towards the good of the whole.

There is further evidence in the report that all persons
have been held in the past, and have been placed in the
and not by the persons themselves; but that persons of various
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the report was made on the 10th of June 1911. There is
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first of these cases was in the first of these cases.

the results of the investigation and that the books containing the records of the investigation are being kept in the files of the Bureau of Investigation.

\$15,000.00, and various renewals of said notes, signed by Frederick G. Hipp and E. Warner Coburn individually were made by them and accepted by plaintiff as collateral security to secure the payment of said loan made to said defendant. On the basis of the above finding of fact the court holds, as a matter of law, that the plaintiff is entitled to a judgment in its favor against the defendant for the sum of \$15,000.00 plus legal interest, in accordance with the special finding of fact as to such interest."

(We have repeatedly condemned the use of the confusing and "and/or".

Terjan v. National Surety Co., 268 Ill. App. 232; City National Bank & Trust Co. v. Daves Hotel, 280 Ill. App. 247.) This finding was marked "Held" and signed by the trial judge. Counsel for defendant say that the finding is against the manifest weight of the evidence; that upon a consideration of all the facts, the judgment (without the conversation testified to by the three witnesses as having taken place in New York on July 7th) is against the overwhelming weight of the evidence. On the other hand, counsel for plaintiff say that it is wholly immaterial upon what evidence the trial judge predicated his decision if he reached the right conclusion, and that upon a consideration of all the evidence it is clear that the finding and judgment for plaintiff was warranted by the evidence and ought not to be disturbed.

Counsel for defendant say, "The question of the nature of this conversation constitutes the crux of this case. Any evidence tending to show what it was, is highly material." And as throwing light upon this question, counsel say that Nabel Frankel should have been permitted to testify as to the conversation she had over the telephone from New York with Hipp, and that this is so because plaintiff, in its letter to defendant of that date (in which the check for \$15,000 was mailed by plaintiff to defendant in Chicago) it was stated that Hipp would be in touch by telephone in Chicago

with defendant on the question of making arrangements for settling "our account as outlined."

We think this conversation was a part of the transaction and should have been admitted in evidence; its rejection was error for which the judgment of the Municipal court of Chicago must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Katchett, J., concur.

with reference to the position of the various members of the family
and the amount of the estate.

It is to be noted that the position of the various members of the family
and the amount of the estate is not the same in all cases. It is to be noted
that the position of the various members of the family and the amount of the estate
is not the same in all cases. It is to be noted that the position of the various
members of the family and the amount of the estate is not the same in all cases.

London, N. Y., New York, N. Y., London, N. Y.

37665

HORTON CONRAD,
Appellee,

v.

CONSUMERS COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

281 I.A. 608³

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in assumpsit. A jury returned a verdict finding the issues for plaintiff and assessed damages in the sum of \$3,500. Defendant has appealed from a judgment entered upon the verdict.

Plaintiff started to work for defendant on December 1, 1925, as a yard clerk. In the early part of the summer of 1926 he was assigned to the downtown office of defendant to learn certain inside work before he was "put on the street as a salesman." During that period he received a salary of \$125 a month. He worked as a salesman during 1926 and 1927 and at the end of that period his salary had been advanced to \$250 a month. About January 1, 1928, the following arrangement was made with the salesman of the company under which they were to receive compensation:

"February 17, 1928

"(Name of Salesman)

"Effective January 1, 1928, and for the year, all salesmen will be paid their present salary and in addition to this, when earned, the Company will pay a bonus.

"The bonus plan is as follows:

"Each salesman is given a certain quota in points, yours being _____ points, based entirely on your present salary, which must be reached before a bonus is paid.

UNITED STATES
APPEALS

7.

CONSTRUCTION COMPANY,
a corporation,
Plaintiff.

UNITED STATES COURT

OF THE DISTRICT

231 I.A. 608

IN RE: CONSTRUCTION COMPANY'S BILL OF LADING FOR THE CARGO.

Plaintiff's first default in answer to.

A verdict finding the answer for plaintiff and assessed damages

in the sum of \$5,300. Defendant has appealed from a judgment

entered upon the verdict.

Plaintiff moved to set aside the judgment on December 1,

1935, as a void ab initio. In the early part of the summer of 1935

he was assigned to the basement office of defendant to learn certain

inside work before he was "put on the street as a salesman." During

that period he received a salary of \$125 a month. He worked as a

salesman during 1936 and 1937 and at the end of that period his

salary had been advanced to \$250 a month. About January 1, 1938,

the following arrangement was made with the salesman of the company

under which they were to receive compensation:

"February 1, 1938

"(Name of salesman)

"Effective January 1, 1938, and for the year, all salesman
will be paid their present salary and an addition to this, when
earned, the company will pay a bonus.

"The bonus plan is as follows:

"Each salesman is given a certain quota
in points, points being
based entirely on your present salary,
which must be earned before a bonus is
paid.

"After your quota is reached, you will receive in addition to your salary \$4.80 per point. The points being arrived at in the following manner.

- "1. STEAM COAL - All coal which is sold at the steam price, or in other words, less than domestic price. 50 tons equal one point.
- "2. DOMESTIC BITUMINOUS - All Southern Illinois, Indiana, Kentucky, etc., coals, also Pocahontas Mine Run, sold at domestic prices. 40 tons equal one point.
- "3. ANTHRACITE, COKE, POCAHONTAS PREPARED COALS - 24 tons equal one point.

"In order to earn the bonus, you must be in the employ of Consumers Company on January 1, 1929."

"Bonuses will be paid in a lump sum as soon after January 1, 1929 as tonnage figures are available.

"W. O. HAWKINS
Manager Fuel Purchases & Sales.

"APPROVED:

"M. E. KRIG
Executive Vice-President." (Italics ours.)

Plaintiff continued to work under that plan during the years 1928, 1929, 1930 and 1931. Prior to January 1, 1932, the salesman had received two ten per cent cuts, which brought plaintiff's salary down to \$202.50. The bonus made by plaintiff for the year 1928 was paid to him sometime in January, 1929, but after 1928 the company allowed salesmen, including plaintiff, to have advances against the bonus the company expected such salesmen would earn. When plaintiff, at the end of May, 1932, quit defendant's employ it had advanced him, over and above his monthly salary, the sum of \$500 to apply on his prospective bonus for that year. About January 1, 1932, defendant submitted to the salesman the following sales plan:

"Chicago, Illinois
October 28, 1931.

"F. U. Everhard:
OFFICE

"Regarding the proposed bonus plan for salesmen, to be

"After your name is removed, you will receive in addition to your salary \$2.00 per month, the salary being subject to the following terms:

- "1. - All work which is done at the same place, or in other words, less than domestic prices, \$2.00 per month and point.
- "2. - DOMESTIC MINING - All domestic Illinois, Indiana, Kentucky, etc., coals, also locations mine and, sold at domestic prices. \$4.00 per month and point.
- "3. - MINING - All domestic foreign coals, \$4.00 per month and point.

"In order to get the bonus, you must be in the employ of Consumers Company on January 1, 1933.

"Bonuses will be paid in a lump sum as soon after January 1, 1933 as funds are available.

"W. D. HARRIS
President, Consumers Company, Chicago, Ill.

"ALB. SWAN:

"W. D. HARRIS

"Executive Vice-President."

"Plaintiff continued to work under this plan during the years 1929, 1930 and 1931. Prior to January 1, 1932, the salesman had received two per cent extra, which grew to plaintiff's salary down to \$202.50. The bonus made by plaintiff for the year 1932 was paid to him sometime in January, 1933, but after 1932 the company allowed salesman, including plaintiff, to have advances against the bonus the company expected such salesman would earn. When plaintiff, at the end of July, 1932, quit defendant's employ it had advanced him over and above his monthly salary, the sum of \$200 to equal on his prospective bonus for that year. About January 1, 1933, defendant admitted to the salesman the following sales plan:

"Chicago, Illinois
October 22, 1931.

"T. U. Everhardt:
OFFICE

"Regarding the proposed bonus plan for salesman, to be

made effective January 1, 1932, we believe the following to be equitable to both the Company and the salesmen:

"It is proposed to continue along similar lines of our present bonus system, making several changes which our experience has shown are the weak points at present.

"We propose to continue to pay our salesmen a monthly salary, based on their previous year's earnings, together with a small expense account commensurate with what we are now paying.

"The system now in effect credits a man at the rate of \$6.00 per point up to his quota - - 50 tons of steam coal make a point - - 40 tons of Pocahontas and domestic Bituminous make a point, and 24 tons of Anthracite Coke or prepared Pocahontas make a point.

"In short, we are now giving credit to our men at the rate of 12¢ a ton on steam coal - 15¢ a ton on domestic Bituminous and 25¢ a ton on Anthracite Coke or prepared Pocahontas. Our proposed plan would credit a man at the rate of \$7.50 per point or 15¢ a ton on steam coal - 18 3/4¢ on domestic Bituminous, and 31 1/4¢ on Anthracite, Coke or prepared Pocahontas.

"After a man has reached his quota under the old plan, he is paid a bonus of \$4.80 per point. Under the proposed plan, he would be paid at the rate of \$10.00 a point for the first 100 points above his quota and \$12.00 a point thereafter.

"The division managers, under the proposed plan, would be paid \$2.00 a point for every point by which their various salesmen exceed their quotas.

"Under the old plan we have been paying salesmen their regular salaries, despite the fact that in some cases - according to our bonus plan - they have fallen ^{way} short of earning their salaries.

"Under the proposed plan we would base a man's salary, where he does not make his quota, on 90% of his quota. For example, if a salesman made 75% of his quota for the year, we would reduce his salary the following year the difference between 90% and 75% - or 15%.

"The above plan has been discussed with all the division managers, who have gone into it thoroughly and accepted it as being sound.

"Attached is a detailed statement of the cost of the proposed plan for our present sales force, using 1930 tonnages as a basis.

"You will note that in 1930, for our total salesmen and sales managers' salaries and bonuses, we paid \$98010.99 - whereas, under the proposed system, with our present sales force, this would aggregate \$91632.12.

"F. G. R.

"ARP"

Plaintiff, together with the other salesmen, was called into a meeting by the heads of the coal department and told that starting the end of

able to reach the ... the effective January 1, 1964, to ...

It is proposed to conduct a study of the effect of the use of the word "and" in the title of a document on the number of errors made in reading the document. The study will be conducted in two phases. In the first phase, a group of subjects will be given a list of documents with the word "and" in the title and a group of subjects will be given a list of documents without the word "and" in the title. In the second phase, the same group of subjects will be given a list of documents with the word "and" in the title and a group of subjects will be given a list of documents without the word "and" in the title. The results of the study will be reported in a separate report.

"We propose to continue to pay our Cuban debt."

1. The following information is being furnished to you for your information only. It is not intended to be used for any other purpose.

[illegible]

"After a long and hot day, the old plan, is paid a sum of \$1.00 per month. The proposed plan, would be paid at the rate of \$1.00 per month for the first 100 points above the \$1.00 point threshold.

...of their quotas.

"After the old plan we have been using to inform their regular salaries, despite the fact that in some cases - according to our former plan - they have failed to receive their salaries."

his salary the following year the difference between \$60 and \$70 -
 all a minimum wage 70% of his salary. In the year, we would receive
 there he does not make his usual amount of his profit. For example,
 "Under the proposed plan we will have a two's salary."

"The above plan was approved by all the divisions.
Sensory, who have been able to identify it as being

...for our present and future needs, and for the benefit of the people of the world.

On 11/11/1967, the following information was received from the Bureau of the Federal Bureau of Investigation (FBI) regarding the activities of the Central Intelligence Agency (CIA) in the United States:

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19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 85

...with the other members, and called to a meeting.

by the head of the coal department and told me concerning the same.

1931 they were to work under the new plan, and the salesman, including plaintiff, accepted the plan. In the early part of 1932 plaintiff called on his "immediate superior," F. U. Eberhardt, "manager of sales and purchases of the coal department," and asked him if the advance against his bonus which he had been receiving each month could be increased to \$600 a month. Eberhardt stated that inasmuch as plaintiff was earning the advance requested he saw no reason why the request should not be granted, but that he would have to get Joseph Hock, vice president, in charge of the coal department, to approve the request before he could grant it. In April Eberhardt wrote to E. F. Johnson, treasurer of defendant company, the following letter:

"April 15, 1932.

"Mr. E. F. Johnson
Treasurer

"Regarding Horton Conrad's advance on commission - Mr. Jos. Hock has O.K.'d it on the basis of \$600.00 per month, which leaves ample surplus to protect us against any slip in tonnage he may have during the summer.

"Will you kindly arrange to take care of Horton on this basis retroactive to January 1, 1932.

"Fred U. Everhard

"Copy to - Mr. Horton Conrad"

In May Johnson wrote the following letter to A. C. O'Laughlin, president of defendant company:

"May 4, 1932

"Mr. A. C. O'Laughlin

"With reference to the request to increase Horton Conrad's monthly payments from \$302.50 to \$600.00, which rate of payment will be earned by him providing his sales for the balance of this year are on the same basis as his sales during 1931.

"According to our records, tonnage sold for the first three months of 1932 is 19,000 tons and on the quota basis of percentage of sales as to salaries, please be advised that he has more than earned his entire salary for 1932 on this tonnage sold.

"Will you please approve this memo as authority to advance his payment to \$600.00 a month retroactive to January 1, 1932?"

that they were to work under the new plan, and the defendant, in
 planning plaintiff, suggested the plan. In the latter part of 1933
 plaintiff called on him "to discuss matters," i.e., business.
 "manager of sales and patronage of the local department," and asked
 him if the advance against his bonus which he had been receiving
 each month could be increased to \$500 a month. Plaintiff stated
 that inasmuch as plaintiff was receiving the bonus requested he
 saw no reason why the request should not be granted, but that he
 would have to get the go by book, vice president, in charge of the coal
 department, to approve the request before he could grant it. In
 April defendant wrote to R. E. Johnson, treasurer of defendant company,
 the following letter:

"April 15, 1933.

"R. E. Johnson
 Treasurer

"Regarding Horton Company's advance on commission - \$25.
 per month. As the balance of \$25.00 per month, which
 leaves ample margin to protect me against any loss in tonnage
 in any one month, I am returning the same."

"Will you kindly arrange to take care of Horton on this
 basis retroactive to January 1, 1933."

"Sincerely,
 Fred B. Overford

"Copy to - Mr. Horton (encl.)"

In May Johnson wrote the following letter to R. E. O'Laughlin, president
 of defendant company:

"May 4, 1933

"Mr. R. E. O'Laughlin

"With reference to the request to increase Horton Company's
 monthly payments from \$25.00 to \$500.00, which rate of payment will
 be earned by him providing he will pay the balance of this year
 due on the same on his sales during 1933."

"According to our records, payments were for the first three
 months of 1933 at \$1,000 each and on the date of payment
 of \$1,000 as to defendant, please be advised that he has more than
 earned his entire salary for 1933 on his tonnage sales."

"Will you please approve this memo as authority to advance
 his payment to \$500.00 a month retroactive to January 1, 1933?"

"The reason for this request is due to the fact that Horton Conrad is to be married in June and his salary now paid will not be adequate to meet his requirements. It is my understanding that Horton Conrad took this up with his superiors prior to the time that his engagement was announced and that his engagement was contingent to a certain extent that these arrangements be made.

"B. F. Johnson"

Not having heard from Eberhardt, plaintiff asked him about the matter the latter part of February and Eberhardt said that he and Hook "felt the same way about the matter" and thought that "everything would be all right." After the receipt of the letter of May 4 O'Laughlin called upon Eberhardt to furnish him information respecting the manner in which plaintiff had secured certain business. In reply thereto Eberhardt sent the following communication to O'Laughlin:

"May 9, 1932

"MR. A. C. O'LAUGHLIN
President

"Regarding your memorandum of May 4, asking for the history of the following buildings:

"1.

BELMONT HOTEL

"Mr. Horton Conrad took this business away from the Methe-Wolf Coal Co. in 1927.

"In 1929-30 the building was taken over by Straus & Co., who gave us no business at all at that time, and with some help from Consumers Company Mr. Conrad was able to retain the business and we are still selling it.

"They average about 4,000 tons a year.

"2.

HOTEL LA SALLE

"Mr. Conrad sold this business in 1929, taking it away from Hafer, who had sold the business for many years.

"In 1930 we sold them 3,000 tons.

"In 1931 we sold them 12,600 tons, and are still selling them.

"3.

CHICAGO BOARD OF TRADE

"Conrad, with the help of George Hager, sold them part of their coal December 4, 1930, after Consumers Company had been definitely told that they did not have a chance of selling them coal.

"In 1931 we sold 500 tons and so far in 1932, 500 tons.

"The reason for this request is that we are sure that
Horton Company is not interested in this and we are sure
will not be asked to do so. His statement is that he is
standing that Horton Company is not interested in this
prior to the time that his statement was made and that
his statement is entirely to a certain extent that there
are no more to be made."

"Mr. W. J. Johnson"

"Not having heard from Mr. Johnson, I am sure that the matter
the latter part of January and February and that he was not
the same way about the matter" and that he was not
all right. "I am sure that the latter part of January and
called upon Mr. Johnson to obtain his information respecting the
manner in which Mr. Johnson had received his information. In reply
therefore Mr. Johnson sent the following communication to Mr. Johnson:

"May 1, 1932"

"Mr. A. C. O'Connell
President"

"I am sure that your statement of May 1, 1932, is correct for the history
of the following matters:

"1."

Mr. Johnson

"Mr. Horton Company took this business away from the Horton-
Coal Co. in 1932."

"In 1930-31 the business was taken over by Horton & Co., who
gave us no business at all at that time, and when some help
from Horton Company was given, this is the only business
business and we are still selling it."

"They average about 4,000 tons a year."

Mr. Johnson

"2."

"Mr. Johnson sold this business in 1930, taking it away from
Horton, who had sold the business for many years."

"In 1930 we sold them 3,000 tons,
"In 1931 we sold them 18,000 tons, and are still selling it."

Mr. Johnson

"3."

"Horton, with the help of George Brown, sold them part of their
coal business in 1930, after Horton Company had been definitely
told that they had not have a chance of selling them coal."

"In 1931 we sold 500 tons and so far in 1932, 500 tons."

"4.

HENRICI'S RESTAURANT

"I sold them in 1927-1928-1929 and it was turned over to Conrad in 1930, when there was a change in the management and he has been able to hold the business ever since.

"They average about 1700 tons a year.

"5.

DWIGHT BROS. PAPER CO.

"Conrad reclaimed this business after it had been lost to Morris-Ward in 1927. The Manager is a friend of his and lives in La Grange.

"He has been selling them ever since - the business averaging about 600 tons.

"6.

ILLINOIS BELL TELEPHONE COMPANY

"I sold them in 1927-1928-1929 and as they needed more attention than I could give them with my present job, it was turned over to Mr. Conrad, due to the fact that his father has been connected with the Telephone Company for years and Horton is personally acquainted with Mr. Hale, the President. Since he has had the business, he has been able to get back some of the Exchanges we lost.

"They average about 17,000 tons a year.

"7.

GORDON STRONG & COMPANY

"I sold them in 1927-1928-1929 and then it was turned over to Horton Conrad and he has been able to get additional buildings from Strong since he has had the business.

"Lately, they only have been averaging 600 tons a year.

"8.

NORTHWESTERN UNIVERSITY (Chicago)

"Was sold by Henry Hafer & Sons for many years. Horton Conrad was able to sell this business in 1927 and has had part of it ever since, averaging about 6,000 tons.

"This last year he also was able to get some coal in the Northwestern University of Evanston, which we had not sold in years.

"9.

CHICAGO BANK OF COMMERCE

"Through Mr. Conrad's acquaintance and friendship with Lloyd Maxwell, a Director of the Bank, he was about to sell coal to the Union Bank when they consolidated with the Chicago Bank of Commerce.

WILLIAM J. HORTON

"I sold them in 1937-1938-1939 and it was turned over to Horton in 1939, when there was a change in the ownership and he has been able to hold the business ever since."

"They average about 1700 tons a year."

WILLIAM J. HORTON

"Horton received this business when it had been lost to Horton in 1937. The business is a part of his and lives in the hands."

"He has been selling them ever since - the business averaging about 600 tons."

WILLIAM J. HORTON

"I sold them in 1937-1938-1939 and as they needed more attention than I could give them with my present job, it was turned over to Mr. Horton, but the fact that this business has been connected with the Horton Company for years and has been in the hands of the same family since then. The business is a part of the Horton family and has been able to get back some of the business as lost."

"They average about 17,00 tons a year."

WILLIAM J. HORTON

"I sold them in 1937-1938-1939 and then it was turned over to Horton in 1939 and he has been able to get back some of the business from Horton since he has had the business."

"Horton, only only have been averaging 600 tons a year."

WILLIAM J. HORTON

"The sold by Horton in 1937-1938-1939 and then it was turned over to Horton in 1939 and he has been able to get back some of the business from Horton since he has had the business."

"This last year he has sold it to Horton in 1939 and he has been able to get back some of the business from Horton since he has had the business."

WILLIAM J. HORTON

"There is a business in the hands of the Horton family and it has been able to get back some of the business from Horton since he has had the business."

"Since he has had the business, he has sold them about 1,300 tons. He has had some help from Mr. E. F. Johnson, but does not get credit for all the tonnage we sell these people.

"10. CENTRAL REPUBLIC BANK AND TRUST CO.

"Mr. Conrad has worked on this business since 1929 and has sold some coal ever since. In the last year he has asked and received help from both Mr. E. F. Johnson and Mr. Geo. Getz, Jr., who is a friend of his.

"Any additional information you might want on these particular jobs, I can probably get for you from Mr. Horton Conrad.

"FRED U. EVERHARD"

Plaintiff had a conference with O'Laughlin between May 15 and 20, 1932, at which Eberhardt was present. Prior thereto O'Laughlin had sent plaintiff a plan that he said was to apply to him only. It was different from the general plan under which the salesmen, including plaintiff, had been working. Plaintiff testified that at the conference plaintiff stated to O'Laughlin that he could not understand why he should be discriminated against and compelled to work under a plan different from the one under which the rest of the salesmen were working; that O'Laughlin stated that the general plan did not apply to plaintiff, was never meant for him, and that plaintiff was getting credit for a lot of business that he was not entitled to; that plaintiff called O'Laughlin's attention to the fact that in prior years he "had always been given credit for that business on previous bonus plans and nothing had been said and there was no reason why I should assume that there had been any change in regard to me;" that O'Laughlin then stated that there were probably some things in the plan that he had submitted to plaintiff that were not right and that he would look into the matter and revise the plan and send it back to plaintiff; that plaintiff stated that if O'Laughlin felt the general plan was unfair to the company that he was willing to accept some new plan provided the company settled with him up to June 1 under the general plan then prevailing, to which

WITNESSES

"Mr. Connel has worked on this business since 1915 and has
well known ever since. In the year 1915 he was
received help from Mr. J. J. Johnson and Mr. Geo. W. H.
He is a friend of Mr. J. J. Johnson and Mr. Geo. W. H."

"Any witness who is not a friend of Mr. J. J. Johnson and
Mr. Geo. W. H. is not a friend of Mr. J. J. Johnson and Mr. Geo. W. H."

WITNESSES

Plaintiff has a conference with defendant between May 15 and 20,
1935, at which defendant was present. Plaintiff stated that he
sent Plaintiff a plan that he said was to apply to him only. It was
different from the general plan which the defendant, including
Plaintiff, had been working. Plaintiff testified that at the time
former Plaintiff stated to defendant that he would not understand
why he should be discriminated against and compelled to work under
a plan different from the one which under the best of the defendant
was working; that Plaintiff stated that he would give him his
copy to Plaintiff, who never came for him, and that Plaintiff was
feeling sorry for a lot of business and he was not satisfied yet;
that Plaintiff called Plaintiff's attention to the fact that in
prior years he had always been given a bill for some business on
previous bonus plans and nothing was said and that was the
reason why I should assume that that was the way things in regard
to me; that Plaintiff then stated that there were probably some
things in the plan which he was supposed to give him some and
right and that he would look into the matter and revise the plan
and send it back to Plaintiff; that Plaintiff stated that if
Plaintiff told the general plan was better to the company than he
was willing to accept, then he was given the company's bill with
him up to him; that I under the general plan was providing, at which

O'Laughlin responded that he was president of the company, that he would tell plaintiff what plan he would work under and that that plan would be retroactive to January 1. Plaintiff further testified that, not hearing from O'Laughlin, he again went to see him, at which time O'Laughlin told him "that he was damn sick and tired of being bothered by a salesman and that he would give me the plan when he got damn good and ready and to get the hell out of his office or he would throw me out." Plaintiff then wrote the following letter:

"May 31, 1932

"Mr. Fred U. Eberhard
Manager Fuel Purchases and Sales
Consumers Company
20 North Wacker Drive
Chicago, Illinois

"Dear Mr. Eberhard:

"I hand you herewith my resignation effective at once. I am exceedingly sorry to be forced to do this, but inasmuch as Mr. O'Laughlin has seen fit to repudiate the arrangements approved by yourself and Mr. Hook, which has resulted in very great embarrassment to me on the eve of my approaching marriage, and has further refused to settle up to date on the bonus plan effective January 1, 1932 before putting me on a new plan, my self respect dictates no other action.

"I shall always remember gratefully the many kindnesses you have personally extended to me and regret that it becomes necessary for me to leave Consumers Company at this time.

"Very truly yours,

(Signed) "Horton Conrad

"P. S. - I expect a full settlement to be made on the basis of the Bonus Plan effective January 1, 1932 up to and including May 31, 1932, and also I expect the full amount of the money deposited by me in the Peabody Investment Fund.

(Signed) "Horton Conrad"

Plaintiff then secured a position with the Eureka Coal & Dock Company. Eberhardt, a witness for defendant, testified that plaintiff was working under the plan that went into effect as to all salesmen at the beginning of 1932; that Hook never questioned that plaintiff was working under that plan. Reed, a witness for defendant, testified that he was the "immediate superior officer" of plaintiff; that

the latter was working under the general plan "applicable to the other salesmen" except McCormick; that plaintiff was "under the bonus system the same as other salesmen;" that if a salesman had earned in excess of the yearly quota at the time he was discharged then he was entitled to a bonus on the yearly quota. At the time plaintiff left defendant company he had earned 533 points. His quota for the entire year was 324 points. The general plan for salesmen for the year 1932 was written by Reed and approved by Hoek, and while it does not seem to have been submitted to O'Laughlin for his approval it is clear that it was put into force and recognized by the company as to all salesmen save one McCormick. Until the conversation with O'Laughlin no one had ever "intimated" to plaintiff that he was not working under the general plan. It is clear from the evidence that the officers of defendant company with whom plaintiff came in contact in the course of his work were of the opinion that the general plan for the year 1932 applied to him. O'Laughlin testified that the general plan under which the other salesmen worked did not apply to plaintiff and that plaintiff worked during the first five months of 1932 without any agreement between him and the company.

Defendant contends that the evidence establishes a contract of employment at will. We have carefully examined the evidence bearing upon this subject and we have reached the conclusion that the jury were fully warranted in finding against this contention. It is rather significant that on July 12, 1932, O'Laughlin instructed his secretary to send a letter to plaintiff that contained the following:

"Mr. O'Laughlin directs me to say, in reply to your letter of the 8th, that bonuses are paid only at the end of the year. Your resignation before the close of the year automatically cancels your rights to a bonus."

This statement impliedly recognizes that plaintiff's employment was for the year, and that he was working under the general bonus plan. In determining whether the contract of employment of plaintiff was one at will or for a specified period of time, the case of Davis v.

The latter was working under the contract which was made with the
other witness, except that the latter was not working for
the same system as the other witness. It is a common fact
known in cases of this kind that the fact of the discharge
when he was called to a court on the 15th of the month
plaintiff left the company on the 15th of the month. It
shows for the entire year was the plaintiff. The general plan for
a person for the year 1931 was written by him and approved by him,
and while it does not seem to have been submitted to O'Connell for
his approval it is clear that it was put into force and recognized
by the company as to all of them save one, O'Connell. Until the
conversation with O'Connell in the early "interim" to plaintiff
that he was not working under the general plan. It is clear from
the evidence that the plaintiff was not working with the general
plan in contact in the course of his work with the company.
That the general plan for the year 1931 applied to him, O'Connell
testified that the general plan under which the other witnesses worked
it was not applied to him. The plaintiff worked during the first
five months of 1931 without any agreement between him and the company.
Defendant contends that the evidence establishes a contract
of employment as well. It has been established the evidence con-
tains upon this subject and we have reached the conclusion that the
evidence was fully satisfied in that regard. It is
further significant that on July 11, 1931, O'Connell instructed his
necessarily to send a letter to plaintiff that contained the following:
"Mr. O'Connell is not to be paid, in fact, in fact, in fact,
of the fact that he was not paid at the end of the year, 1931,
in fact, before the close of the year, 1931, in fact, before the
close of the year."
His statement fully explains the plaintiff's position and
for the year, and that he was not paid under the general plan.
In determining whether the contract of employment of plaintiff was
made at all or for a specified period of time, the case of Levy v.

Haglestein, 263 Ill. App. 57, appears to be instructive. There it was said (pp. 61-2):

"Whether the hiring of a person is for a specific or for an indefinite period has been the subject of much consideration and diversity of opinion by the courts, some holding that the duration of a contract of hiring which fixes the compensation at a certain amount per day, week, month or year but which fixes no specific term, is a hiring at will, while other courts reach the opposite conclusion. See note, Warden v. Hinds, 25 L. R. A. (N.S.) 529. Obviously no set form of words or course of conduct is required to make the employment at will or for a specific period of time but each case must be determined on its own facts. All of the attendant conditions surrounding the agreement, as well as the terms of the contract itself, when the contract is not clear, the course of dealing and other acts, must be taken into consideration in determining the question whether the employment is at will or for a definite term. Maynard v. Royal Worcester Corset Co., 200 Mass. 1. In that case the court, after recognizing the diversity of opinion in the courts of different jurisdictions, said (p. 5): 'Without reviewing the cases or analyzing the principles to determine which is the sounder view, it is enough to say that the use of the sum of money equivalent to a year's pay, in describing the amount which the plaintiff was to receive, was proper for consideration in connection with other incidents. The length of the term of service reasonably inferable as the understanding of the parties, from their words, course of dealing and other acts, was a fact to be determined upon all the evidence.' So, in the instant case, the testimony of the plaintiff and one of the defendants as to the terms of the oral contract of hiring, as well as the conduct of the parties and other acts, were proper for the consideration by the jury in determining whether the hiring was for a specific or for an indefinite period of time. We hold that the question was one of fact for the jury and not a question of law to be determined by the court because we are of the opinion that all reasonable minds would not reach the conclusion that the period of hiring was definite or indefinite."

Defendant contends that plaintiff was entitled to a bonus only in the event that he completed a year's employment and that when he resigned his employment on May 31 "any right he had to a bonus up to that time ended." If the jury found that plaintiff was working under the general plan for 1932, that O'Laughlin repudiated the plan as to plaintiff and told the latter that he would write a contract which he must accept and which would be retroactive, plaintiff undoubtedly had the right to quit the employment of defendant, and his rights, under such circumstances, would be the same as if he had been wrongfully discharged. To sustain its contention that plaintiff was entitled to a bonus only in the event that he completed a year's employment, defendant cites the following provision contained in the

original bonus plan put in force on January 1, 1928: "In order to earn the bonus, you must be in the employ of Consumers Company on January 1, 1929." Defendant's evidence as well as plaintiff's shows that this provision was never followed after the first year and that plaintiff and other salesmen were repeatedly advanced during the year moneys against bonus or commissions. Eberhardt testified that "as long as the tonnage kept up to a point the company would be sure to come out even on it." Plaintiff, at the time he quit his employment, had been paid \$500 to be applied against his bonus or commissions for the year 1932. Defendant, in its brief, states: "Under his contract of employment with the Consumers Co., plaintiff had a salary of \$202.50 a month, and, in addition, was advanced \$100 a month against a bonus or commissions to be earned during the year." Defendant's witness Reed testified that at the time defendant quit he had earned 533 points and that his quota for the entire year was 324 points; that if an employee were discharged and had "earned in excess of the yearly quota up to the time he was discharged, then he would be entitled to a bonus of the yearly quota." If defendant's theory of this case were adopted it would logically follow therefrom that it could arbitrarily and unjustly discharge plaintiff on December 30, 1932, and thereby deprive him of a large sum of money he had earned by way of bonus. Neither the evidence nor the law supports such an unconscionable theory.

Defendant contends that the court erred in admitting, over its objection, plaintiff's alleged contract in reference to his employment with the Eureka Coal & Dock Company. We find no merit in this contention. Plaintiff, upon direct, had testified as to his commissions with his subsequent employer, the Eureka Coal & Dock Company. Upon cross-examination the witness stated that the agreement between him and the Eureka Coal & Dock Company had been reduced to writing. Counsel then moved that all the testimony "about the agreement with

original intent was not to be on January 1, 1933. In order to
 enter the pension, you must be in the employ of defendant company on
 January 1, 1933. Defendant's evidence as well as Plaintiff's
 shows that this provision was never followed after the first year
 and that Plaintiff and other witnesses were reasonably a various during
 the year money against some or considerable. Defendant testified
 that "as long as the company went up to a point the company would be
 sure to come out even on it." Plaintiff, at the time he quit his
 employment, had been paid \$500 to be applied against his pension or
 commission for the year 1933. Defendant, in the past, various
 "Under his contract of employment with the defendant company, Plaintiff
 had a salary of \$250.00 a month, but, in 1933, was reduced \$100
 a month and in a month or two, before to be reduced during the year."
 Defendant's affidavit stated that at the time defendant quit
 he had earned \$134 points and that his basis for the active year was
 324 points; that if an employee quit during the year "earned in
 excess of the yearly quota as to the time he was at the point, then he
 would be entitled to a bonus of the yearly quota." If defendant's
 theory of this case were accepted it would logically follow that from
 that it could arbitrarily and unjustly deprive Plaintiff of December
 30, 1932, and thereby deprive him of a large sum of money he had earned
 by way of bonus. Neither the witness nor the law supports such an
 unreasonable theory.

Defendant contends that the court erred in admitting, over
 its objection, Plaintiff's witness contract as relevant to the dispute
 made with the Burns Coal & Iron Company. We find no error in this
 contention. Plaintiff, upon direct, had testified as to his con-
 tention with his employer, the Burns Coal & Iron Company.
 Upon cross-examination the witness stated that the agreement between
 him and the Burns Coal & Iron Company had been reduced to writing.
 General then moved that all the testimony "about the agreement with

the Eureka Coal Company be stricken. The writing is the best evidence." The court then properly held that the witness could testify as to what amounts he received from the Eureka Coal Company and counsel for defendant acquiesced in that ruling. The following day defendant's counsel, upon further cross, asked the witness to produce the written contract, and he thereupon produced what purports to be a "memorandum of agreement" between plaintiff and the Eureka Coal & Dock Company. The memorandum, typewritten on the stationery of the Eureka Coal & Dock Company, after reciting what purports to be an agreement, concludes as follows:

"If the above is agreeable and is the understanding of this agreement, we shall be glad to have Mr. Conrad affix his signature hereto.

(Signed) "Horton Conrad"

The witness testified that the document was his copy of the contract. The terms of the agreement stated in this document corroborate plaintiff's oral testimony as to the alleged agreement. Defendant then objected to the introduction of the document because it did not bear the signature of the Eureka Coal & Dock Company. It is sufficient to say, in reference to the instant contention, that plaintiff had already testified to the same agreement stated in the written memorandum, and he had also testified that this was the only written agreement that he had with the Eureka Coal & Dock Company, and, therefore, even if it could be held that the memorandum was not competent, defendant was not prejudiced by its introduction. Furthermore, the evidence bore only on the question of damages, and in any view of the evidence the damages awarded were not excessive.

Defendant contends that the court erred in charging the jury. As required by section 67 of the new Practice act, the charge was in the form of a continuing and consecutive narrative. Defendant takes from the context of the court's charge a single sentence and then argues that because of a single word contained therein the jury

the Turkey Coal Company as witness. The witness is the best evidence. The court then properly held that the witness testified as to that content of the Turkey Coal Company and content of defendant's evidence in that regard. The following day defendant's counsel, upon further cross, asked the witness to produce the written contract, and the witness produced that and the points to be a "Memorandum of Agreement" between Plaintiff and the Turkey Coal Company. The memorandum, written on the stationery of the Turkey Coal Company, after reciting that purports to be an agreement, concludes as follows:

"If the above is agreeable and is the understanding of this agreement, we shall be glad to have Mr. Conroy affix his signature hereto."

(Signed) "Boston Company"

The witness testified that the document was his copy of the contract. The terms of the agreement stated in this document corroborate Plaintiff's oral testimony as to the alleged agreement. Defendant then objected to the introduction of the document because it did not bear the signature of the Turkey Coal Company. It is sufficient to say, in reference to the instant contention, that Plaintiff had already testified to the same agreement stated in the written memorandum, and he had also testified that this was the only written agreement that he had with the Turkey Coal Company, and, therefore, even if it could be held that the memorandum was not competent, defendant was not prejudiced by its introduction. Furthermore, the evidence bore only on the question of a copy, and in any view of the evidence the document was not exclusive.

Defendant contends that the court erred in admitting the copy. It is replied by Section 67 of the new Practice Act, the change was in the form of a continuing and consecutive narrative, defendant takes from the content of the court's charge a single sentence and then argues that because of a single word contained therein the jury

might have been misled into believing that they must find for plaintiff if they found that there was any contract of any character whatsoever between the parties. From a reading of the entire charge, which takes up ten pages of the abstract, it is clear that the jury could not have been misled, as defendant argues. Section 67 gives a party the right to make objections to such parts of the charge as are deemed to be incorrect or misleading, "such suggestions or objections to be specific." Defendant made no objection to the word in the instruction that it now criticizes and it seems clear that the instant contention is an afterthought. Defendant further contends that the court erred in refusing to incorporate in his charge to the jury the following instruction tendered by it:

"The Court instructs the jury that if you believe from all the evidence under the instructions of the Court that under the contract of employment between the plaintiff and the defendant the plaintiff was not entitled to a bonus over and above his salary on the coal sold unless he completed the year from January 1 to December 31, 1932, inclusive, then in the event you find the issues in favor of the plaintiff, in estimating the damages, if any, sustained by plaintiff, you shall not include therein any amounts as bonus."

The court was fully justified in refusing to give this artfully drawn instruction. As we have heretofore stated, to sustain its contention that plaintiff was entitled to a bonus only in the event that he completed a year's employment, defendant relies upon a provision contained in the original bonus plan put in force January 1, 1928, viz., "In order to earn the bonus, you must be in the employ of Consumers Company on January 1, 1929." The evidence shows, as we have heretofore stated, that this provision was never followed after the first year and that plaintiff and other salesmen were repeatedly advanced during the year moneys against bonus or commissions; that plaintiff, at the time he quit his employment, had already been paid \$500 to be applied against his bonus or commissions for the year 1932. This instruction would deprive plaintiff of any bonus "unless he completed the year from January 1, to December 31, 1932," even though the jury found that

might have been put into evidence that they were not for
plaintiff if they found that there was any connection of any character
whatsoever between the parties. From a reading of the entire transcript
which takes up ten pages of the transcript, it is clear that the jury
could not have been misled, as defendant argues. Section 67 gives a
party the right to make objections to such parts of the charge as
are deemed to be incorrect or misleading, such objections or objec-
tions to be specified. Defendant made no objection to the words in
the instruction that it was misleading and it seems clear that the
instruction contained no error. Defendant further contends
that the court erred in refusing to incorporate in the charge to the
jury the following instruction tendered by it:

"The court instructs the jury that it is not believe from
all the evidence that the instruction of the court is correct
the contract of employment between the plaintiff and the defendant
the plaintiff was not entitled to a bonus over and above his salary
on the coal mines he completed the year January 1 to
December 31, 1932. Inclusive, when in the year ending the
issues in favor of the plaintiff, in estimating the bonus, if
any, contained by plaintiff, now shall not include therein any
amounts as bonus."

The court was fully justified in refusing to give this instruction
instruction, as we have heretofore stated, to sustain its contention
that plaintiff was entitled to a bonus only in the event that he com-
pleted a year's employment, failing to rely upon a provision contained
in the original bonus plan was in force January 1, 1932, viz., "In
order to earn the bonus, you must be in the employ of defendant's Company
on January 1, 1932." The evidence shows, as we have heretofore stated,
that this provision was never followed after the first year and that
plaintiff and other witnesses were repeatedly advanced during the year
months against bonus or commissions that plaintiff, at the time he
made his employment, had already been paid 1932 to be applied against
his bonus or commissions for the year 1932. This instruction could
deprive plaintiff of any bonus unless he completed the year from
January 1, to December 31, 1932," even though the jury found that

plaintiff was working under the general plan for 1932, that O'Laughlin repudiated the plan as to plaintiff, and told the latter that he would write a contract which he must accept and which would be retroactive. In one of the instructions submitted to the court by defendant and incorporated in the charge is the following:

"When the employment is for a definite period of time neither party has the right to terminate the employment before the expiration of that period."

After reading the entire charge of the court we are satisfied that the rights of defendant were fully protected.

We find no merit in defendant's last contention, that "under the admitted testimony plaintiff has suffered no damages and at most was entitled to nominal damages."

Defendant has had a fair trial and the judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Sullivan and Friend, JJ., concur.

himself was willing to accept the general idea of the
 termination of the plan as to himself, and also the fact that he would
 write a contract which he would accept and which would be operative

in one of the first actions submitted to the court by defendant and
 incorporated in the contract in the following:

"When the mortgage is for a definite period of time
 neither party has the right to terminate the mortgage before the
 expiration of that period."

After reading the entire charge to the jury he explained that the
 rights of defendant were fully protected.

He then went on to state in defendant's first conversation, that under
 the admitted existing practice he would be foreclosed and as to

was entitled to receive \$20,000.

Defendant was then a fair trial and the judgment of the

trial court of Cook County is affirmed.

RECORDED.

WILLIAM AND WILSON, 111, COURT.

37779

PEOPLE OF THE STATE OF ILLINOIS,
(Plaintiff) Plaintiff in Error,

v.

HENRY KLINE,
(Defendant) Defendant in Error.

34 11
ERROR TO MUNICIPAL
COURT OF CHICAGO.

231 I.A. 608⁴

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People sued out this writ of error to reverse a judgment of the Municipal court of Chicago setting aside a prior judgment entered by that court. The case comes to us upon the common law record.

On August 15, 1933, the People filed an information in the said court charging that Henry Kline, defendant in error, hereinafter called defendant, on August 11, 1933, "did then and there unlawfully have in his possession a certain instrument adopted for the use of habit forming drugs towit a hypodermic needle and eye dropper adopted to the use of habit forming drugs by subcutaneous injections and possessed for the purpose of administering habit forming drugs in viol of Par 192 M.Chap. 38 S. H. R. S. 1931," contrary to the form of the statute, etc. The common law record shows that on August 15, 1933, defendant was arraigned, plead not guilty to the charge, waived a trial by jury, and the cause was submitted to the court; that defendant was represented by counsel; that the court, after hearing the testimony, found defendant guilty as charged in the information and sentenced him to confinement at labor in the house of correction for the term of one year. While defendant was in the house of correction there was filed, on March 2, 1934, a verified petition in the nature of a

OFFICE OF THE STATE OF ILLINOIS
(Chicago, Illinois)

v.

JOHN W. KILPATRICK
(Respondent in error)

321 A. 1. 308

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFFS,
VERSUS
JOHN W. KILPATRICK, DEFENDANT.

The People of the State of Illinois, by and through their
Attorneys, the undersigned, do hereby certify that the
judgment rendered by the Court in the above entitled cause
is a correct and true copy of the original as the same
appears in the records of the Court.

On August 15, 1935, the People filed an information in

the said Court charging that John W. Kilpatrick, Defendant,

has unlawfully and knowingly, on August 15, 1935, with intent and

thereunto lawfully have in his possession a certain instrument

adapted for the use of said instrument, to wit: a hypodermic

needle and the use of said instrument, to wit: the use of said

by subcutaneous injections and possession for the purpose of

administering said instrument, to wit: the use of said

to the use of said instrument, to wit: the use of said

common law to wit: that on August 15, 1935, Defendant was

arrested, placed not guilty to the charge, waived a trial by jury,

and the case was submitted to the Court; that Defendant was

represented by counsel; that the Court, after hearing the testimony,

found Defendant guilty as charged in the information and sentenced

him to confinement at labor in the House of Correction for the term

of one year. This judgment was in the House of Correction House

was filed, on March 2, 1936, a verified petition in the nature of a

writ of error coram nobis, and the judgment which the state seeks to reverse was entered upon that petition. The petition is as follows:

"Petition Under Section 72
of the Civil Practice Act.

"Your petitioner, Henry Kline, respectfully represents unto this Honorable Court that he is now incarcerated in the House of Correction under a judgment entered by this Honorable Court on the 15th day of August, 1933, by which judgment the said Henry Kline was sentenced to the House of Correction for a term of one (1) year.

"Your petitioner further shows that he was not represented by counsel at the time of trial in this case and that there is evidence which could be presented to the court which would prove to the court that defendant is innocent of the charge as made and which was not presented to the Court through no fault of this petitioner and is entitled to a new trial at the earliest convenience so that said evidence can be presented to the Court and a motion made for new trial.

"Your petitioner therefore prays the court that the defendant be brought from the House of Correction for a hearing on this petition.

Henry W. Kline"

The People contend that the petition was wholly insufficient to warrant a proceeding under section 72 of the new Civil Practice act and that therefore the court was without jurisdiction to vacate the judgment. It is the law of this state that if the state desires to question the sufficiency of such a petition, it must save the question by raising it in the trial court and securing a ruling thereon. The sufficiency of the petition may be raised by demurrer, plea of nullo est erratum, by motion to dismiss, or by pleading special matters in confession and avoidance. (See People v. Green, 355 Ill. 468, 474-5, and cases cited therein.) The record shows that the state failed to challenge in any way the sufficiency of the petition. The state's attorney seeks to excuse this state of the record by contending that the notice required by the statute was not served upon the state's attorney. This contention is not supported by the record. An order entered March 2, 1934, recites notice to the state's attorney. An order of March 6, 1934, recites that the state's attorney was present

with of every other person, and the judgment which the court should
to render was subject to the petition. The petition is de
follows:

"Petition Under Section 75
of the Civil Procedure Code."

"Your petitioner, Henry Alfred, respectfully represents
unto this Honorable Court that he is now incarcerated in the House
of Correction under a judgment of the Court of Sessions, dated on
the 12th day of June, 1904, by which judgment the said Henry
Alfred was sentenced to the term of imprisonment of one year
(1) Year."

"Your petitioner further shows that he was not represented
by counsel at the time of trial in this case and that there is evi-
dence which would be sufficient to show that he would have been
convicted that judgment is in favor of the charge on which he
was sentenced to the term of imprisonment of one year and which was
is entitled to a new trial of the said case on the ground that he
was not represented to the Court and a motion may be now
made."

"Your petitioner therefore prays the Court that the
sentence be removed from the House of Correction for a hearing on
this petition."

"Henry A. Alfred."

The People contend that the petition was wholly insufficient
to warrant a proceeding under section 75 of the Civil Procedure Code
and that therefore the Court was without jurisdiction to vacate the
judgment. It is the law of this State that if the State desires to
question the sufficiency of such a petition, it must have the question
raised in the trial court and during a ruling thereon. The
sufficiency of the petition may be raised by a demurrer, time of ruling
of the Court, by motion to dismiss, or by a general special motion in
disposition and judgment. (See People v. Green, 131 Ill. 402, 407-8,
and cases cited therein.) The Court holds that the State failing to
raise in any way the sufficiency of the petition. The State's
counsel seeks to remove the State from the record by contending that
a motion removed by the State was not removed when the State's
counsel. This contention is not supported by the records. In other
words, when it is said, "motion made to the Court's attorney," on
the 12th day of June, 1904, it means that the State's attorney was present

at the hearing on the petition, and further recites that after the prayer of the petition had been sustained the hearing of the cause was by an agreement made in open court between the state's attorney and defendant, submitted to the trial court, and that the state's attorney took part in the trial. We find nothing in the record to indicate that the state's attorney at any time or in any manner raised the question of want of notice.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan and Friend, JJ., concur.

of the nation on the occasion, and further evidence that after the
prayer of the nation and some witnesses for the cause
and by an agreement made in some other manner the whole
and defendant, subject to the trial court, and that the whole
attorney took part in the trial. It was decided in the court in
which the case was heard, a majority of the court in any court, raised
the question of the trial.

The judgment of the court of Illinois is affirmed.

Reversed.

William and Henry, Jr., counsel.

37785

PEOPLE OF THE STATE OF ILLINOIS
(Plaintiff) Plaintiff in Error,

v.

HAROLD KINNISH,
(Defendant) Defendant in Error.

357
ERROR TO MUNICIPAL
COURT OF CHICAGO.

281 I.A. 609¹

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People sued out this writ of error to reverse a judgment of the Municipal court of Chicago setting aside a prior judgment entered by that court. The case comes to us upon the common law record.

On September 18, 1933, the People filed an information in said court charging that Harold Kinnish, defendant in error, hereinafter called defendant, on September 17, 1933, operated a motor vehicle upon a public highway of the state situated within the corporate limits of the city of Chicago, "in a wanton or reckless manner, showing an utter disregard for the safety of others under circumstances likely to cause great bodily injury," and that he thereby caused an injury to Ben J. Frankowski, contrary to the statute, etc. The common law record shows that on September 18 defendant was arraigned, plead not guilty to the charge, waived a trial by jury, and the cause was submitted to the court; that defendant was represented by counsel, and that the court, after hearing the testimony, found defendant guilty as charged in the information and sentenced him to confinement at labor in the house of correction for the term of one year and to pay a fine of \$1,000.

While defendant was in the house of correction there was

RECORDS OF THE STATE OF ILLINOIS
(Plaintiff) vs. (Defendant)
v.
NAROLD KINARD, Defendant in error.

281 I.A. 609

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.
The People sued out this writ of error to reverse a judgment of the Municipal Court of Chicago setting aside a prior judgment entered by that court. The case comes to us upon the common law record.
On September 18, 1937, the People filed an information in said court charging that NAROLD KINARD, Defendant in error, herein-after called defendant, on September 17, 1935, operated a motor vehicle upon a public highway of the State situated within the corporate limits of the city of Chicago, in a manner or manner manner, showing an utter disregard for the safety of others under circumstances likely to cause great bodily injury, and that he thereby caused an injury to SAM J. FROSTWORTH, contrary to the statute, etc. The common law record shows that an indictment in defendant was returned, filed not only to the grand jury, but also by jury, and the same was submitted to the court; that defendant was represented by counsel, and that the court, after hearing the testimony, found defendant guilty as charged in the information and sentenced him to imprisonment at labor in the house of correction for the term of one year and six days in 1937. While defendant was in the house of correction there was

filed, on January 15, 1934, a verified petition in the nature of a writ of error coram nobis, and the judgment which the state seeks to reverse was entered upon that petition.

The People contend that the petition was wholly insufficient to warrant a proceeding under section 72 of the new Civil Practice act and that therefore the court was without jurisdiction to vacate the judgment. The petition, after stating the charge made against defendant in the information, recites the following:

"2. Your petitioner further represents that on, to wit, the 17th day of September, A. D. 1933, he was then and there arrested by the Police of the City of Chicago, without a warrant, taken to a Police Station in said City of Chicago, and kept and detained there over night, without being permitted to consult counsel, and that thereafter, on the 18th day of September, A. D. 1933, the said Harold Kinnish was brought before one Eugene J. Holland, then and there a Judge of the Municipal Court of Chicago; that the said Harold Kinnish, then and there asked the said Judge Eugene J. Holland for a continuance in order to employ counsel; that the said Judge Eugene J. Holland, peremptorily and without hearing any evidence, refused to allow the said Harold Kinnish to employ counsel, and then and there declared that he was a witness to the alleged accident or crime with which the said Harold Kinnish is alleged to have been charged, as hereinbefore stated; that the said Judge Eugene J. Holland immediately on said case being called for trial on the aforesaid 18th day of September, A. D., 1933, proceeded without hearing any evidence and without the semblance of a fair trial and without advising the defendant of his right to be tried by a jury, as guaranteed him by the Constitution of the State of Illinois and the Constitution of the United States, and without permitting the said Harold Kinnish to employ counsel, in palpable and flagrant violation of the constitutional rights of said Harold Kinnish, the said Judge Eugene J. Holland immediately found the said Harold Kinnish guilty of operating a motor vehicle upon a public highway in a wanton and reckless manner, showing an utter disregard for the safety of others, under circumstances likely to cause great bodily harm, and then and there sentenced the said Harold Kinnish to the House of Correction, for the term of one year, and also fined him One Thousand Dollars (\$1000) and costs taxed at Six Dollars and Fifty Cents (\$6.50), and then committed the said Harold Kinnish in the House of Correction until the said fine and costs are paid or worked out at One Dollars and Fifty Cents (\$1.50) per day.

"3. Your petitioner further shows that the conduct of the said Judge Eugene J. Holland was unduly biased, prejudiced, and contrary to the fair and impartial trial that the said Harold Kinnish was guaranteed by the Constitution of the State of Illinois and the Constitution of the United States; that the said Judge Eugene J. Holland was disqualified from acting as a Judge in the sentencing of the said Harold Kinnish, as aforesaid, because of the fact that the said Judge Eugene J. Holland was an eye-witness to the accident.

"4. Your petitioner further represents that in support of

filed, on January 12, 1935, a verified petition in the nature of a writ of error coram vobis, and the following day the state made to return and entered upon said petition.

The people contend that the petition was legally invalid -

claim to warrant a writ of error coram vobis is of the same kind. Practice set out that therefore the court was without jurisdiction to vacate the judgment. The petition, after stating the charges

made against defendant in the information, recites the following:

"2. Your petition further represents that on, to-wit, the 17th day of September, A. D. 1933, he was then and there arrested by the police of the City of Chicago, without a warrant, taken to a Police Station in said City of Chicago, and kept and detained there over night, without being permitted to consult counsel, and that thereafter, on the 18th day of September, 1933, the said Harold Kinship was brought before the said Judge Holland, then and there a Judge of the Municipal Court of Chicago; that the said Harold Kinship, then and there asked the said Judge Eugene J. Holland for a continuance in order to employ counsel; that the said Judge Eugene J. Holland, purportedly and without hearing any evidence, refused to allow the said Harold Kinship to employ counsel, and then and there declared that he was a witness to the alleged accident or crime with which the said Harold Kinship is alleged to have been charged, as is recited in the indictment; that the said Judge Eugene J. Holland immediately on his being called for trial on the 19th day of September, A. D. 1933, proceeded without hearing any evidence and without the assistance of a fair trial and without giving the defendant the right to be tried by a jury, as guaranteed him by the Constitution of the State of Illinois and the Constitution of the United States, and without permitting the said Harold Kinship to employ counsel, in said case and in violation of the constitutional rights of said Harold Kinship, the said Judge Eugene J. Holland immediately found the said Harold Kinship guilty of operating a motor vehicle upon a public highway in a reckless and careless manner, driving in violation of the City of Chicago, under circumstances likely to cause great bodily harm, and then and there sentenced the said Harold Kinship to the House of Correction, for the term of one year, and also fined him one thousand dollars (\$1000) and costs, and said Judge Eugene J. Holland immediately found the said Harold Kinship in the House of Correction until the said fine and costs were paid or worked out at the rate of fifty cents (\$0.50) per day.

"3. Your petition further shows that the content of the said Judge Eugene J. Holland was mainly false, fraudulent, and contrary to the fair and honest trial that the said Harold Kinship was guaranteed by the Constitution of the State of Illinois and the Constitution of the United States; that the said Judge Eugene J. Holland was disqualified from acting as a Judge in the sentencing of the said Harold Kinship, as recited in the first part of the said petition; that the said Judge Eugene J. Holland was an eyewitness to the charges

"4. Your petition further represents that in support of

the statement made in regard to the Judge being a witness to the accident, your petitioner herewith furnishes an excerpt from the Chicago Daily Tribune of September 18th, 1933, which is in words and figures as follows, to-wit:

**"JUDGE SEES AUTO CRASH AND
JAILS DRIVER FOR YEAR**

**Drunken Autoist and Four
Friends Also Fined.**

Judge Eugene Holland, who presides in the Traffic court, stepped his automobile last Sunday at 31st and State streets to wait for a traffic light change before making a left turn. A second car, in which five men were riding, crashed into a car parked in front of the judge.

Gustave Trojanowski, 50 years old, a passenger in the parked car, suffered a fracture of the skull and possible internal injuries. The automobile which caused the accident sped away, but was overhauled by a police squad and the five occupants arrested.

Harold Kinnish, 26 years old, 5311 Dorchester avenue, the driver, who fled, was arraigned yesterday before Judge Holland on charges of driving while intoxicated and reckless driving. Kinnish was given the maximum punishment on both charges; six months in jail and a \$1,000 fine on the charge of driving while intoxicated, and one year in jail and a fine of \$1,000 on the reckless driving charge.

Must Pay Fines in Full

The Jail sentences were made to run concurrently, but Judge Holland ordered Kinnish to pay the full \$2,000 in fines. Each of Kinnish's companions was fined \$200 and costs on disorderly conduct charges and they were taken to the county jail to serve out the fines on their inability to pay.

They are Rudolph Hazelbauer, 28 years old, 341 West 42d place; Joseph McIntyre, 23 years old, 1532 119th street, Whiting; John McIntyre, 21 years old, 314 West 42d place, a cousin of Joseph, and William Sheely, 21 years old, 219 Root Street.'

"The original of said article your petitioner is ready, willing, and able to produce upon a hearing of this cause.

"5. Your petitioner further alleges that the said complaint upon which the sentence of your petitioner is based was not sworn to before a Judge of the Municipal Court of Chicago, as expressly provided for by statute, that the said Judge Eugene J. Holland did not fix bail as expressly provided by statute, and your petitioner further alleges that he did not have an opportunity to employ counsel; that the said Judge Eugene J. Holland did not appoint counsel for him and he had no counsel to represent him during the proceedings aforesaid, that the record in the above case shows that a jury was waived by your petitioner, while the facts really are that your petitioner specifically did not waive a jury, that your petitioner did not know and could not know that the Court was disqualified from acting because he was an eye-witness to said accident and was acting upon his own knowledge; that your petitioner, Harold Kinnish, was 'railroaded'

[illegible]

There was no belief, no feeling in the heart of
count, story of his name in the history of the
these words to wait for a further change, before
making a last turn. A second one, in which the man
were there, the first time was fixed in front of the
house.

and the five original members. The recent report by the FBI, however, indicates that the membership of the group is now 100, and that the group is now active in the United States. The FBI report also states that the group is now active in the United States.

[illegible]

1952 年 11 月 17 日

The bill was passed by the House of Representatives on March 1, 1909, and by the Senate on March 1, 1909. It was signed by President William Howard Taft on March 1, 1909.

They are also handicapped by the fact that they are not organized into a single group, but are scattered throughout the country. This is a serious disadvantage, and it is one of the reasons why the movement has not been able to achieve its goals.

1. The original of this letter is in the possession of the FBI, and the copy of this letter is being furnished to the Bureau for their information.

1. The first question is whether the defendant is a person who is not a citizen of the United States. The defendant is a citizen of the United States, and therefore is not a person who is not a citizen of the United States.

to jail and imprisoned without being allowed to defend himself; that your petitioner was not permitted to have a court reporter to take down what was happening; that your petitioner has no means of presenting an adequate Bill of Exceptions before this Court upon appeal because he had no counsel to protect his rights, nor was there any court reporter present in the Courtroom to take down the testimony, or to preserve a Bill of Exceptions so that your petitioner could take the matter up on writ of error or appeal; nor was your petitioner permitted to employ a court reporter for said purpose.

"6. Your petitioner further alleges that ever since the 18th day of September, A. D., 1933, and up to and including the time of the filing of this Petition, your petitioner has been incarcerated and imprisoned in the House of Correction of Chicago; that for the first time his friends have employed counsel for him now; that he was unable to employ counsel to institute this action because he was ignorant of what to do and had no means of finding out his rights.

"7. Your petitioner further represents that he has a good and meritorious defense to the charges made against him in the complaint, to wit, that he is not guilty of the charges made therein and that if the judgment is vacated and the sentence is set aside and your petitioner is granted a new trial he will be able to present a good legal defense to the charges against him and that if he be given leave to employ counsel, which right was denied him at the time that the judgment was entered against him, your petitioner is certain that he is not guilty and can prove he is not guilty of the charges made upon a fair and impartial trial.

"8. Your petitioner further alleges that more than thirty days have elapsed since the entry of the judgment of conviction against him and the passing of sentence upon him, and that the only means whereby a review of the record is possible is for this Court to allow a motion for a new trial in the above matter.

"9. Your petitioner further represents that the Constitution of the State of Illinois provides that in a criminal prosecution, the accused shall have the right to appear and defend in person and by counsel; that although the mittimus in the above case recites that your petitioner was represented by counsel, he, in fact, was not represented by counsel and the record itself does not show an appearance by any attorney.

"Wherefore, your petitioner prays that this Court enter an Order vacating the judgment of conviction heretofore entered and set aside the sentence based upon said judgment in accordance with the statute in such case made and provided and granting to your petitioner, Harold Kinnish, a new, fair and impartial trial as guaranteed him by the Constitution of the United States and the Constitution of the State of Illinois, that your petitioner be released and discharged from imprisonment in the House of Correction, and that your petitioner have such other and further relief in the premises as to this Court shall deem proper and as the law provides.

"Harold Kinnish
Petitioner

By Jean Hickman

Duly authorized agent in this behalf."

not see your petition. I would be happy to receive it. I
petition would be the number of people who are
petition, or to have a bill introduced to that
there is no law. I am not in the position to say
equal to that of the bill of the House. I am
to the House. I am not in the position to say
that your petition is not in the House. I am
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to the House. I am not in the position to say

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

10. The Commission has also received information from the
authorities of the State of New York that the author of the
document is not a member of the Communist Party of the United States
and is not a member of the Communist Party of the State of New York.
The Commission has also received information from the
authorities of the State of New York that the author of the
document is not a member of the Communist Party of the United States
and is not a member of the Communist Party of the State of New York.
The Commission has also received information from the
authorities of the State of New York that the author of the
document is not a member of the Communist Party of the United States
and is not a member of the Communist Party of the State of New York.

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Detroit, Michigan
 March 1944
 Remained open, yet
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It is unnecessary for us to determine the sufficiency of the petition, as it is the law of this state that if the state desires to question the sufficiency of the petition in a proceeding like the present one, it must save the question by raising it in the trial court and securing a ruling thereon. The sufficiency of the petition may be raised by demurrer, plea of nullo est erratum, by motion to dismiss, or by pleading special matters in confession and avoidance. (See People v. Green, 355 Ill. 468, 474-5, and cases cited therein.) The record shows that the state failed to challenge in any way the sufficiency of the petition. It seeks to excuse this state of the record by contending that the notice required by the statute was not served upon the state's attorney. This contention is without merit. The record shows that a notice was served upon the state's attorney that the petition would be presented to Judge Eugene J. Holland of the Municipal court of Chicago. In addition we find five orders postponing the hearing of the petition, each of which recites that the state's attorney was present at the time of the entry of the order. The order vacating the judgment recites that counsel for the People was present and took part in the proceedings. An order entered February 21, 1934, recites that the state's attorney had notice of the filing of the petition and we find nothing in the record to indicate that the state's attorney at any time or in any manner raised the question of want of notice. Counsel for defendant makes the statement in defendant's brief that Manuel E. Cowen, Assistant State's Attorney, was present at the entry of all orders and during the hearing upon the petition and that the state's attorney's office "seemed to approve of the Court curing the injustice." The state's attorney has not seen fit to answer this statement. The Supreme court and this court have in a number of cases stated the manner in which the People may challenge the sufficiency of a petition in the nature of a writ of error coram nobis. The state's attorney complains that some of the judges of

the Municipal court are abusing the writ and discharging defendants without warrant of law. If this complaint is warranted it is the plain duty of the state's attorney to properly protect the record in each case. Allowing judgments by default will certainly not tend to stop the abuse.

Defendant contends that "this petition * * * is a civil proceeding and not a criminal proceeding, and therefore, under the new Civil Practice Act, writ of error will not lie, the State's only remedy being by appeal," and that, therefore, the instant writ of error should be dismissed. While technically the proper method of review of the instant judgment is by appeal, for the reason that a proceeding like the instant one is civil in its nature (see People v. Green, supra, p. 473), rule 28 of the Supreme court provides:

"* * * If a writ of error be improvidently sued out in a case where the proper method of review is by appeal, or if appeal be improvidently employed where the proper method of review is by writ of error, this alone shall not be a ground for dismissal, but if the issues of the case sufficiently appear upon the record before the court of review, the case shall be considered as if the proper method of review had been employed."

For the reasons stated, the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan and Friend, JJ., concur.

The majority have shown the will not to consider the
 witness without a law. If this conclusion is sustained it is the
 plain fact of the majority's conduct to justify the course
 in each case. The law is not to be applied by the majority not
 tend to stop the abuse.

Justice Brandeis said: "The decision of a civil
 proceeding and not a criminal proceeding, and therefore, under the
 new civil procedure act, the right of appeal will not be, and the only
 remedy being by appeal." and that, therefore, the remedy of
 error should be eliminated. While Justice Brandeis is the author of
 review of the instant judgment is by appeal, for the reason that
 a procedure like the instant one is vital to the nation's peace
 v. Green, supra, p. 473, vol. 22 of the Supreme Court Reports.

"It is a well known fact that in a
 case where the proper method of review is by appeal, or if appeal
 be impracticably delayed there the proper method of review is by
 writ of error. This Court shall not be a ground for dismissal, but
 if the facts of the case sufficiently appear upon the record before
 the court of review, the writ shall be considered as if the proper
 method of review had been employed."

For the reasons stated, the judgment of the majority

court of review is affirmed.

REVEREND.

William and Edward, Esq., Boston.

37786

PEOPLE OF THE STATE OF ILLINOIS,
(Plaintiff) Plaintiff in Error,

v.

HAROLD KINNISH,
(Defendant) Defendant in Error.

36 17
ERROR TO MUNICIPAL COURT
OF CHICAGO.

281 I.A. 609²

PRESIDING
MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People sued out this writ of error to reverse a judgment of the Municipal court of Chicago setting aside a prior judgment entered by that court. This case comes to us upon the common law record.

On September 18, 1933, the People filed an information in said court charging that Harold Kinnish, defendant in error, hereinafter called defendant, on September 17, 1933, operated a motor vehicle upon a public highway of the state situated within the corporate limits of the city of Chicago "in a wanton or reckless manner, showing an utter disregard for the safety of others under circumstances likely to cause great bodily injury and did thereby then and there cause an injury to another * * *; that Harold Kinnish at the time and place aforesaid did then and there drive or operate a motor vehicle upon a public highway of this State, situated within the corporate limits of the City of Chicago aforesaid while drunk or intoxicated," contrary to the statute, etc. The common law record shows that on September 18 defendant was arraigned, plead not guilty to the charge, waived a trial by jury, and the cause was submitted to the court; that defendant was represented by counsel; that the court, after hearing the testimony, found defendant guilty as charged in the information and sentenced him to confinement at labor in the

house of correction for the term of six months and to pay a fine of \$1,000. While defendant was in the house of correction there was filed, on January 18, 1934, a verified petition in the nature of a writ of error coram nobis, and the judgment which the state seeks to reverse was entered upon that petition. The instant charge involves the same state of facts as was present in the case of People v. Kinnish, App. Ct. Gen. No. 37785 (opinion handed down this date). After a statement of the charge made against defendant in the information the petition in the instant case is the same as the one in People v. Kinnish, No. 37785.

The People contend that the petition was wholly insufficient to warrant a proceeding under section 72 of the new Civil Practice act and that therefore the court was without jurisdiction to vacate the judgment. As the record shows that the state, in the trial court, failed to challenge in any way the sufficiency of the petition, it cannot now question its sufficiency. It is unnecessary for us to restate what we said in People v. Kinnish, App. Ct. Gen. No. 37785, in answer to a like contention. In the instant case the further contention of the state that the notice required by the statute was not served upon the state's attorney is not supported by the record. What we said in case No. 37785 as to a like contention applies to the record in the instant case.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan and Friend, JJ., concur.

37868

MATTIE LEE McCANT,
(Plaintiff) Appellee,

v.

EDWARD E. PRESSLER,
(Defendant) Appellant.

37 A
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

281 I.A. 609³

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT,

Plaintiff sued defendant in an action on the case. There was a verdict finding defendant guilty and assessing plaintiff's damages at \$400 and judgment was entered upon the verdict. Plaintiff has not seen fit to file a brief in this court.

Plaintiff was struck and injured by an automobile at a street intersection in Chicago. Defendant admitted the ownership of the automobile but contended that he had loaned it to one Berg and that the latter, at the time in question, was using it solely for his own purposes. It is the settled law of this state that the owner of an automobile who merely permits another to use it for his own purposes is not liable for the negligence of the person^{so} using it. (White v. Seitz, 342 Ill. 266, 271; Arkin v. Page, 287 Ill. 420; Graham v. Page, 300 Ill. 40.) Plaintiff conceded this principle of law but contended that defendant was operating the automobile at the time in question.

Defendant contends, inter alia, that the verdict is contrary to the overwhelming weight of the evidence. This contention must be sustained. It is undisputed that there were four persons in the car at the time of the accident and all testified that defendant did not drive the car and was not in it at the time of the accident. Defendant

MATTIE LAW MCCARTY,
(Plaintiff), Respondent,

v.

EDWARD K. MCCARTY,
(Defendant), Appellant.

221 I.A. 609

THE FOLLOWING IS THE VERDICT OF THE COURT:

Plaintiff and Defendant in an action on the case. There

was a verdict finding defendant guilty and assessing plaintiff's

damages at \$400 and judgment was entered upon the verdict. Plaintiff

has not seen fit to file a writ in this court.

Plaintiff was given an interest by an agreement as a

joint interest in the car. Defendant admitted the ownership of

the automobile but contended that he had loaned it to one Berg and

that the latter, at the time in question, was using it solely for

his own purposes. It is the settled law of this state that the owner

of an automobile who merely permits another to use it for his own

purpose is not liable for the negligence of the person using it.

(White v. White, 342 Ill. 556, 571; White v. White, 347 Ill. 401)

Ulrich v. White, 300 Ill. 401. Plaintiff conceded this principle of

law but contended that defendant was operating the automobile at the

time in question.

Defendant contends, inter alia, that the verdict is contrary

to the overwhelming weight of the evidence. This contention must be

rejected. It is undisputed that there were four persons in the car

at the time of the accident and all testified that defendant did not

drive the car and was not in it at the time of the accident. Defendant

testified that he was not in the car at the time of the accident; that on the day in question his friend, Berg, told him that he wanted to take out some friends and requested the use of defendant's car for that purpose; that as defendant had not used the car for nearly six months he told Berg that he might have the use of it, and Berg thereupon took the car. Berg corroborated this testimony of defendant as to the loaning of the car. The only testimony introduced by plaintiff in support of the claim that defendant was driving the car at the time of the accident was that of plaintiff and Dr. Lucas. After the accident plaintiff was taken to the doctor's office, and she testified that after the doctor had given her a treatment a tall colored man and a short white man took her to a car and drove her to her home; that the white man said his name was Pressler. The witness further testified that she had never seen that man before the accident nor since. Dr. Lucas testified that two men came to his office after the accident and gave their names as Pressler and Berg; that the one who gave the name of Pressler was a short, stout fellow and the one who gave his name as Berg was a tall, spare fellow, with "a bad eye." The witness further testified that he had never seen them before the accident nor since. Defendant objected to the evidence of plaintiff and the doctor as to the alleged statements of the two men, but the trial court allowed it to stand. Berg testified that he went to the doctor's office after the accident and that after the doctor examined plaintiff he took her to her home, but that he did not hear the name of Pressler mentioned in the presence of the doctor or plaintiff. The evidence conclusively shows that defendant is five feet, eleven and one-half inches in height.

In the view that we have taken of this appeal it is unnecessary for us to consider other contentions raised by defendant.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Sullivan and Friend, JJ., concur.

testified that he was not in the car at the time of the accident;
 that on the day in question his friend, Smith, told him that he wanted
 to take out some friends and requested the use of defendant's car for
 that purpose; that defendant had not heard the car for nearly six
 months he told him that he might have the use of it, and that he
 upon took the car. When contacted this testimony of defendant
 as to the location of the car. The only testimony introduced by
 plaintiff in support of the claim that defendant was driving the car
 at the time of the accident was that of plaintiff's mother,
 after the accident plaintiff was taken to the doctor's office, and
 the testimony that after the accident had given her a treatment a tall
 colored man and a short white man took her to a car and drove her to
 her home; that the white man said his name was "Cassius". The witness
 further testified that she had never seen that man before the accident;
 nor since. Mr. Jones testified that two men came to the office after
 the accident and gave their names as "Cassius" and "Smith"; that the one
 who gave the name of "Cassius" was a short, stout fellow and the one
 who gave his name as "Smith" was a tall, spare fellow, with a bad eye.
 The witness further testified that she had never seen them before the
 accident nor since. Defendant objected to the evidence of plaintiff
 and the doctor as to the alleged statements of the two men, but the
 trial court allowed it to stand. When testified that he was in
 the doctor's office after the accident and that after his recovery
 examined plaintiff he took her to his home, but that he did not hear
 the name of plaintiff mentioned in the presence of the doctor or
 plaintiff. The witness conclusively states that defendant is the driver
 thereof and one-half interest in defendant.
 In the view that we have taken of this appeal it is not
 necessary for us to consider other questions raised by defendant.
 The judgment of the superior court of Cook County is
 reversed and the case is remanded for a new trial.
 WILLIAM AND TERRY, J.J., concur.

37923

WEIGHTSTILL WOODS,
Appellant,

v.

VILLAGE OF LAGRANGE PARK,
Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

231 I.A. 609⁴

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in assumpsit. Defendant filed a general demurrer to the declaration, which was sustained, and plaintiff electing to stand by his declaration the suit was dismissed with judgment against him for costs.

The declaration alleges that on April 20, 1927, defendant was indebted to plaintiff in the sum of \$5,000 for the reasonable value of professional services rendered to it at its request in connection with a special assessment proceeding confirmed February 14, 1927, by an order entered in the Superior court of Cook county, case No. 449,649; that said amount was payable out of the funds of this special assessment proceeding; that plaintiff rendered a bill to defendant for his services, including cash outlays and expenses; that defendant, by its duly authorized officers, accepted, approved and allowed the said bill and issued and delivered to him a special assessment warrant or voucher, dated April 20, 1927, against the funds to be collected in the said proceeding, "whereby defendant acknowledged that said professional legal services had been rendered by the plaintiff in good faith, in a competent and satisfactory manner, and had been received, accepted and approved by the defendant as being reasonably worth at least said sum of money;" that the said

special assessment proceeding was declared void by a decision of the Supreme court; that thereafter, on September 19, 1930, without notice to plaintiff and without his consent, defendant caused the order of confirmation in the special assessment proceeding to be vacated and set aside, and caused the assessment roll and all proceedings and orders to be vacated and set aside and the cause dismissed; that plaintiff, in a suit thereafter filed in the Superior court of Cook county, case No. 528,254, established that no other special assessment could be substituted or provided for the payment of the special assessment voucher issued to plaintiff by defendant; that it was further established in said suit that plaintiff had a right to be paid for the said services out of the general fund of defendant; that the instant suit is brought to enforce payment of plaintiff's claim by defendant out of its general corporate funds, and that the reasonable value of the services rendered, together with cash outlays, is \$5,000.

The case referred to by plaintiff in his declaration in which the special assessment proceedings No. 449,649 were declared void, is Gray v. Black Co., 338 Ill. 488. There the court held that the ordinance providing for the making, levying and collecting of the special assessment was void, reversed the decree entered by the Superior court of Cook county, and remanded the cause with instructions to enter a decree declaring the ordinance in question and all subsequent proceedings thereunder void, and ordering an injunction as prayed for in the bill. The suit referred to in the declaration as case No. 528,254 is Wrightstill Woods v. Village of LaGrange Park, 266 Ill. App. 435, decided by this branch of the court.

As plaintiff contends, our decision is controlled by the late case of Bunge v. Downers Grove San. Dist., 356 Ill. 531. There plaintiffs, attorneys at law, filed a declaration in assumpsit to recover attorneys' fees in connection with four special assessment

special management proceedings was ordered by a majority of
the supreme court; that judgment, on November 15, 1934, directed
notice to plaintiff and various other persons, defendants and
order of contribution in the special management proceedings to be
vacated and set aside, and ordered the judgment to be set
aside and ordered to be vacated and set aside and the cause
dismissed; that plaintiff, in a suit brought in the supreme
court of Cook county, Illinois, on December 15, 1934, brought
special management proceedings for the purpose of obtaining
of the special management proceedings being in violation of the
that it was further requested in said suit that plaintiff be
right to be paid for the said services out of the assets of the
defendants; that the finding was in favor of the plaintiff and
plaintiff's claim for recovery out of the assets of the
and that the respective value of the various claims, together
with each estate, is \$10,000.
The same was ordered to be vacated in the said court as
which the special management proceedings were ordered
void, in Gray v. Gray, 322 Ill. 402, 1934, 100 S.W.2d 101, 102.
The findings provided for the plaintiff, together with the
the special management proceedings, together with the assets of the
superior court of Cook county, and awarded the same with
to enter a decree dissolving the partnership and all other
grant provisions for payment void, and ordering an accounting to
prayed for in the bill. The suit referred to in the decision
as case No. 322, 402 in Gray v. Gray, 322 Ill. 402, 100 S.W.2d
No. 111, 402, 450, decided by this branch of the court.
As plaintiff contended, but decided is reversed by the
late case of Gray v. Gray, 322 Ill. 402, 100 S.W.2d 101, 102,
plaintiff, together with the assets of the
plaintiff's claim, together with the assets of the

cases abandoned or discontinued by defendant without plaintiffs' fault or negligence. The court said (p. 537):

"Defendant contends that it is not liable because the contracts were contingent upon completion of the improvements. It has been repeatedly held by this court that where a special assessment proceeding is not carried to completion, either because of the invalidity of the ordinance or because it is dismissed before confirmation, the municipality cannot avoid payment by setting up the contingent nature of the contract but is liable out of the general fund. (Maher v. City of Chicago, 38 Ill. 266; Gray v. City of Joliet, 287 id. 280.) Defendant having repudiated its contracts with plaintiffs, they were entitled to treat the contracts as rescinded and recover upon quantum meruit so far as they had performed. (Lake Shore and Michigan Southern Railway Co. v. Richards, 152 Ill. 39.)" (Italics ours.)

See also Hall v. County of Cook, 359 Ill. 528, 547, where Bunge v. Downers Grove San. Dist. is cited with approval.

In this court defendant contends that "the questions of law and fact involved in this proceeding were adjudicated in the case of Woods v. Village of LaGrange Park et al., 266 Ill. App. 435." It is a sufficient answer to this contention, a clear afterthought, to say that the defense of res judicata was not raised by plea or answer, and, therefore, it cannot be interposed here. (Webster v. Toulon School Dist., 313 Ill. 541, 550.) However, we are satisfied that if such a plea had been interposed, it would not be good. In the case we decided the complainant contended that special assessment proceeding No. 77 was a new proceeding for the same improvement involved in special assessment proceeding No. 449,649 and that he was entitled to share in the surplus of trust funds arising under the new proceeding. We held against his contention, stating (p. 441):

"After considering the statutes and the authorities cited, we are of the opinion that the only costs of making and levying an assessment, which could properly be included in the assessment, are the costs of making, levying and collecting the particular assessment which the court confirms."

In other words, we held that the trust fund arising under the new assessment proceeding was not applicable to pay the warrant issued to plaintiff in the former special assessment proceeding. In the instant case plaintiff is seeking to recover upon quantum meruit. There are

other good grounds why a plea of res judicata would not be good but we deem it unnecessary to state them.

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to overrule the general demurrer of defendant and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

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THE UNIVERSITY OF CHICAGO

U.S. GOVERNMENT PRINTING OFFICE: 1967 O 345-101

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37927

WANDA ORLOWSKI,
Appellant,

v.

E. J. CAINE,
Appellee.

39 A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

281 I.A. 609⁵

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Superior court to recover damages for personal injuries alleged to have resulted from the negligence of defendant. At the close of all the evidence the court directed a verdict for defendant and entered judgment on the verdict.

The declaration charged that July 7, 1931, defendant was driving an automobile around the northwest corner of Monroe and Franklin streets, in Chicago, so negligently as to cause the handle of the door of his car to engage the left arm of plaintiff, who was standing at the corner, severely injuring her. Willfulness, wantonness, excessive speed and failure to give due and sufficient warning were also charged. Defendant filed a plea of not guilty and a special plea that plaintiff was an employee of an employer under the Workmen's Compensation act, and that her injury arose out of and in the course of her employment and that an award for compensation for the injury charged had been granted to her by the Industrial Commission, and paid. The plea also alleged that defendant came within the provisions of the act, in that he was employed by an employer within section 3 and was in the course of his employment at the time of the injury to plaintiff. The plea sets forth section 29 of the act, which provides

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202. A. I. 152

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

the verdict.

The defendant charged that July 2, 1941, defendant was driving an automobile through the defendant's garage of defendant and Franklin Avenue, in Chicago, he negligently drove the car into the hands of the town of his car to engage the back end of defendant, who was standing at the rear of the car, and was injured. Defendant's negligence, recklessness, and failure to give the car sufficient warning were charged. Defendant's plan was not timely and a special plea that defendant was an employer of an employee under the Workmen's Compensation Act, and that defendant arose out of and in the course of her employment was filed. An answer for compensation for the injury charged had been granted to her by the Industrial Commission, and paid. The plan also alleged that defendant came within the provisions of the act, in that he was employed by an employer within section 2 and was in the course of his employment at the time of the injury to plaintiff. The plan also took section 2 of the act, which provides

that in such circumstances the right of the injured person is subrogated to the employer, and avers that plaintiff is barred and that the action can be maintained only by her employer for the compensation paid. To these pleas plaintiff filed a similitur and a replication that defendant was not operating under the act nor in the course of his employment at the time of the injury.

It appears from the record that on the date in question, about 9:15 or 9:30 in the morning, plaintiff was on an errand for her employer, and upon reaching the northwest corner of Franklin and Monroe streets was about to cross Monroe street in a southerly direction. She had stepped into Monroe street and had proceeded two or three feet south when the green light for north and south traffic changed, and east and west traffic began to move. She stepped back, had one foot on the curb and one in the street when defendant's automobile came around the corner, without warning, and, as plaintiff contends, at a high rate of speed. The handle of the door of the automobile engaged her left arm, dragging her along and imbedding itself in the flesh of her arm. She thereupon jumped on the running board and was carried some 50 feet before the automobile stopped. One Wilming, a passerby, helped to remove her arm from the handle of the car, bound the wound with his handkerchief, and she was taken in defendant's car to the Iroquois hospital and given first aid. From there she was taken to the LaSalle garage in a taxicab, and from the LaSalle garage to the County hospital, and later was removed to another hospital where she received treatment for about three weeks.

Defendant offered in evidence a certificate of the Liberty Mutual Insurance Company certifying that the Pepperell Mfg. Co., of 160 South State street, Boston, Mass., was insured under the Workmen's Compensation act, the policy covering "clerical, office and salesmen, Adams building, 222 West Adams street, Chicago, Illinois." Evidence

that in such circumstances the right of the injured person to
subrogate to the employer, and upon that liability is placed
and that the action was an independent one of the employer for
the compensation paid. In those circumstances there is a liability
and a recognition that defendant has not operating under the act
may in the course of his employment at the time of the injury.

It appears from the record that on the date in question,
about 9:15 or 9:30 in the morning, defendant was on his way to
his employer, and upon reaching the highway between St. Louis
and Kansas there was about to cross Kansas street in a southerly
direction. She had stepped into Kansas street and was crossing
two or three feet south when the green light for north and south
traffic changed, and east and west traffic began to move, and stopped
back, had one foot on the curb and one in the street when defendant's
automobile came around the corner, stopped, turning, with its headlights
on, at a high rate of speed. The driver of the car of the
automobile engaged her left arm, stopping her along the intersection
itself in the flash of her arm. The defendant jumped on the ground
heard and was carried some at least before the automobile stopped.

One witness, a passenger, helped to remove her from the hands of
the car, bound the wound with his handkerchief, and the car drove in
toward a car to the Kansas hospital and given it to the
there she was taken to the Labelle hospital in a taxi, and from the
Labelle hospital to the County hospital, and later was removed to
another hospital where she received treatment for about three weeks.
Defendant offered in evidence a certificate of the County

Medical Insurance Company certifying that the reported date, 1901, of
160 South West street, Kansas, was injured while the defendant
Compensation act, the policy covering "accidental, illness and sickness,
death benefit, 1000 per annum, 1000 per annum, 1000 per annum.

defendant

was also presented that \angle was one of the salesmen at the sales office in Chicago, and had a desk there. Defendant testified that there is no Pepperell Mfg. Company plant in Illinois, and that he was employed as a salesman out of the Milwaukee office, on a monthly salary, without commission. The territory assigned to him was upper Illinois, Wisconsin, several towns in Minnesota, Michigan and Iowa, and that he exercised his own judgment in working the territory assigned to him. He had ten or eleven customers in Chicago, and stated that on the day of the accident he was on his way to keep an appointment with a Mr. Egan, a buyer for the Florsheim Shoe Co., located at Clinton and Adams streets. He had previously stopped at 448 North Wells street, and when asked why he turned on Monroe street to reach his destination at Clinton and Adams streets, he stated that it was more or less of a habit of his to go down Monroe to reach Florsheim's factory.

In rebuttal plaintiff offered to show by a copy of the records of the Hotel LaSalle garage, made at the time by G. Orłowski, her sister, that defendant's car, bearing license No. 36-D-150503, was brought into the garage on the day of the accident, recorded on card 43741, with a charge of \$2 for washing and \$1 for mechanical services, and that the car was checked in at 9:45 that morning. This evidence was offered in rebuttal of the testimony of defendant that the accident happened between 10:00 and 10:30 a.m., and in support of plaintiff's evidence that it had occurred around 9:30 a.m. Plaintiff also offered to show the time that she was received at the County hospital. Both of these offers were refused by the court.

It is plaintiff's principal contention that defendant, who had entire control of his own movements and was driving his own car; and used his own judgment as to where and when he would go within the territory assigned to him, was not an agent of the Pepperell Mfg. Company, and therefore did not come within the

defendant

was also presented that one of the witnesses at the trial
 office in Chicago, and had a bank account. Defendant testified
 that there is no report of Mrs. Gorman being in Chicago, and
 that he was employed as a salesman out of the Chicago office,
 on a monthly salary, without commission. The territory assigned
 to him was upper Illinois, Wisconsin, covered some in Minnesota,
 Michigan and Iowa, and that he executed his own judgment in selling
 the territory assigned to him. He had ten or eleven customers in
 Chicago, and stated that on the day of the accident he was on his way
 to keep an appointment with a Mr. [redacted], a buyer for the defendant
 [redacted] Co., located at Clinton and [redacted] streets. He had previously
 stopped at 148 North [redacted] street, and then when he turned on
 Monroe street to reach his destination at Clinton and Adams streets,
 he stated that it was more or less a matter of his to go down
 Monroe to reach Planchette's factory.

In rebuttal plaintiff offered to show a copy of the
 records of the Hotel Lafayette, made at the time of D. Gorman's
 stay there, that defendant's car, bearing license no. 12-10000,
 was brought into the garage on the day of the accident, recorded on
 card 41741, with a charge of \$3 for washing and 11 for mechanical
 services, and that the car was checked in at 1:45 that morning. This
 evidence was offered in rebuttal of the testimony of defendant that
 the accident happened between 10:00 and 10:30 a.m., and in support
 of plaintiff's evidence that it had occurred around 9:00 a.m. Plaintiff
 also offered to show the time that the car was checked in at the
 county hospital. Both of these offers were refused by the court.
 It is plaintiff's original contention that defendant
 did not have control of his own movements and was driving his car
 car, and used his own judgment as to where and when he would go
 within the territory assigned to him, and not an agent of the
 Reppertell Mfg. Company, and therefore did not come within the

provisions of section 29 of the Workmen's Compensation act; also that, assuming defendant to have been an agent of the Pepperell Mfg. Co., yet at the time and place in question he was not within the course of his employment.

Whether defendant at the time of the injury was an agent of the company by whom he was employed, or stood in the relation of an independent contractor, was a question of fact to be determined by the jury. It was so held in Best Mfg. Co. v. Creamery Company, 307 Ill. 238, wherein the court said (p. 241):

"Whether the relationship is one of employee or independent contractor is not to be settled by general rule of law but by the facts of each particular case. * * * 'The right to control the manner of doing the work is the principal consideration which determines whether the worker is an employee or an independent contractor.'"

In Ferguson & Lange Company v. Industrial Commission, 346 Ill. 632, on pp. 635, 636, the court said:

"It is impossible to lay down a rule by which the status of a person performing a service for another can be definitely fixed as an employee or as an independent contractor. Ordinarily no single feature of the relation is determinative, but all must be considered together."

To the same effect is Meece v. Holland Furnace Co., 269 Ill. App. 164. Various tests of the relationship have been discussed by the courts of this and other states, depending generally upon the facts of the particular case. (McCraner v. Munn, 284 Pac. Rep. 603; Dohner v. Winfield Wholesale Grocery Co., 226 Pac. 767; Hempstead v. Toledo Scale Co., 270 Ill. App. 299.)

It was also a question for the jury to determine whether defendant, who was employed out of the Milwaukee office and whose sales territory was principally outside of Chicago, except for a few customers in the city, came within the provisions of Pepperell Mfg. Company's insurance certificate. As bearing upon these questions of fact, the time of the accident became one of the important considerations. The evidence discloses that defendant had an appointment with Mr. Egan at 10:30 a.m., and it is urged by plaintiff that, if

provisions of section 20 of the Workmen's Compensation Act; also that, according to the evidence, it was not until after the accident that the plaintiff was placed in the position of an independent contractor. The course of his employment.

Whether defendant at the time of the injury was an agent of the company by whom he was employed, or acted in the relation of an independent contractor, was a question of fact to be determined by the jury. It was so held in East v. East, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638.

"Whether the relationship is one of employee or independent contractor is not to be decided by general rule of law but by the facts of each particular case. The right to control the manner of doing the work is the principal consideration which determines whether the worker is an employee or an independent contractor."

In Vernean & Sons v. Industrial Union, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638, the court said:

"It is impossible to lay down a rule by which the status of a person performing a service for another may be definitely fixed as an employee or as an independent contractor. It is merely a question of fact to be determined by the jury, and all cases are controlled together."

To the same effect is Woods v. Illinois Central, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638. Various tests of the relationship have been suggested by the courts of this and other states, depending upon the facts of the particular case. (Woods v. Illinois Central, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638.)

Bohner v. Winfield Police & Grocery Co., 207 Ill. 638, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638.

W. J. Lewis & Co., 207 Ill. 638, 207 Ill. 638, 207 Ill. 638, 207 Ill. 638.

It was also a question for the jury to determine whether defendant, who was employed out of the Milwaukee office and whose entire territory was principally outside of Chicago, sought for a few days in the city, was within the provisions of paragraph 1 of Company's insurance certificate. On hearing upon these questions of fact, the time of the accident became one of the important considerations. The witness testified that defendant had an appointment with her agent at 10:30 a.m., and it is urged by plaintiff that it

the accident took place at 9:15 or 9:30, as she contends, defendant could not have been on his way to the Florsheim plant at the time, which was nearly an hour before he was required to be there. Defendant's reply to this contention is that he desired to be at Florsheim's before the appointed time, so as to get an early interview, since other salesmen were to be there on the same mission. This, however, is a controverted question that should have been submitted to the jury, and the proffered evidence, denied by the court, was competent to assist the jury in determining the fact as to whether or not defendant was in the course of his employment at the time of the accident.

In view of our conclusion that the court should not have directed a verdict, but should have received the offered evidence and submitted the facts to the jury, we deem it unnecessary to further discuss the relationship of defendant to the Pepperell Mfg. Company or the question whether the company's certificate of insurance entitled defendant to the protection of the Workmen's Compensation act.

Judgment of the Superior court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

37942

CROWN PAINT & VARNISH WORKS, Inc.,
a corporation, for the use of
WALTER KRZYZANSKI, a minor, by
Eva Krzyzanski, his mother and
next friend,

Appellee,

v.

HARRY W. CLINE, doing business
as CHICAGO ASSOCIATION OF
CREDIT MEN, garnishee,
Appellant.

40 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

281 I.A. 610¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Walter Krzyzanski, a minor, by Eva Krzyzanski, his mother and next friend, had judgment in the municipal court for \$362 and costs November 23, 1933, against Crown Paint & Varnish Works, Inc., a corporation, and American Putty Works, a corporation, defendants. Thereafter, April 2, 1934, an affidavit for garnishment was filed, reciting the entry of said judgment and praying that summons issue to Harry W. Cline, doing business as Chicago Association of Credit Men, returnable April 16, 1934. April 13, 1934, Cline filed his answer, stating that he had no credits, property, choses in action, effects or moneys in which Crown Paint & Varnish Works, Inc., and American Putty Works had any interest whatsoever, and prayed to be discharged as garnishee. The cause came on for trial June 11, 1934, before Judge Holmes of said court, without a jury, was partly heard and then continued to July 2, 1934. August 14, 1934, the cause again came on for trial before Judge Lyle of said court, then presiding in the attachment and garnishment branch of the municipal court. Counsel for defendant

GRON TAIN & TRENCH, Inc.,
a corporation, for the use of
WALTER KRYZANOWSKI, a witness, by
Eve Kryzanskowski, his mother and
next friend,
Appellee.

v.

HARRY W. CLINE, doing business
as CHICAGO ASSOCIATION OF
GENTLEMEN, Plaintiff,
Appellant.

231 A. 810

THE OFFICE OF THE CLERK OF THE COURT

Walter Kryzanskowski, a witness, by Eve Kryzanskowski, his
mother and next friend, has judgment in the case against Harry W.
Cline and costs November 21, 1934, entered upon the record.
Cline, Inc., a corporation, and American Daily News, a cor-
poration, defendants. The record, April 1, 1934, an affidavit
for garnishment was filed, reciting the entry of said judgment
and praying that summons issue to Harry W. Cline, doing business
as Chicago Association of Gentlemen, defendant April 10, 1934.
April 13, 1934, Cline filed his answer, stating that he had no
property, choses in action, effects or things in which there were
a certain sum, Inc., and American Daily News and his interest
therein, and prayed to be discharged as defendant. The cause
came on for trial June 11, 1934, before Judge Nelson of said court,
without a jury, and was then remanded to July 2,
1934. August 26, 1934, the cause again came on for trial before
Judge Lyle of said court, then presiding in the absence of the
presiding judge of the said court. Found for defendant.

objected to the hearing before Judge Lyle on the ground that it had been partially heard by Judge Holmes. The attorneys for the respective parties thereupon entered into a stipulation of facts, as follows:

"Be, and it is hereby stipulated by and between the parties hereto, by their attorneys, that Harry W. Cline, the defendant garnishee, is trustee for the benefit of the creditors of the Crown Paint and Varnish Works and the American Putty Works, under a voluntary assignment for the benefit of creditors. That the plaintiff has garnisheed Harry W. Cline, doing business as Chicago Association of Credit Men, to recover moneys for a judgment rendered against the Crown Paint and Varnish Works and American Putty Works."

The court entered judgment against the garnishee in the sum of \$362 and costs, from which this appeal is prosecuted. Plaintiff has not entered his appearance in this court, and no briefs are filed in defense of the judgment.

Although the parties stipulated that an assignment was made for the benefit of creditors, and raised no question as to the validity of the assignment, we note from the record that considerable dispute arose upon the hearing before Judge Holmes as to whether the assignment was valid and made in good faith. Furthermore, the stipulation is silent as to whether plaintiff's judgment was based upon a wage claim, but in the colloquy between court and counsel Judge Lyle based his finding partially on the assumed fact, which does not appear in the stipulation, that plaintiff was entitled to a preference because his judgment was based on a preferred claim. The stipulation of the parties is also silent as to the amount realized by the trustee from the sale of assets assigned to him. Consequently it was error for the court to enter judgment against the garnishee for \$362, because there was no showing that the garnishee had such amount in his possession.

Under the circumstances, the judgment of the municipal court will be reversed and the cause remanded, so that the parties

projected to the building... had been... negative... as follows:

The... and it is... the... of the... under a... the... Chicago... judgment... negative...

The court... and court... entered his... defense of the...

Although the... means for the... the... evidence... which does not... to a first... The... resulted in... Garbage... the... which has each...

Under the... court will be...

may upon a new trial present to the court the facts omitted by the record which are necessary for the determination of the issues involved.

REVERSED AND REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

and upon a new trial present to the court the issues raised by
the party which are necessary for the determination of the
issues involved.

REVEREND THE HONORABLE

REVEREND THE HONORABLE THE CHURCH

37960

BENJAMIN J. SCHULTZ,
Appellee,

v.

YELLOW CAB COMPANY, a
corporation, and JAMES
ESTAVER and ANNA ESTAVER,
Defendants.

YELLOW CAB COMPANY,
a corporation,
Appellant.

4 / 17
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

231 I.A. 610²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, an attorney at law, filed suit in the Municipal court under the Attorneys' Lien act to recover from defendants Yellow Cab Company, a corporation, (hereinafter referred to as the cab company) and James and Anna Estaver, the sum of \$200 alleged to be due him for legal services rendered the Estavers pursuant to a written agreement for legal services entered into with them. The court heard the cause without a jury, found in favor of defendants Estavers, and against the cab company, and entered judgment accordingly. This appeal by the cab company followed.

The original statement of claim filed by plaintiff alleges in substance that he entered into an agreement with Anna Estaver and James Estaver to represent them in the enforcement of their claims against the cab company for injuries sustained as the result of the negligence of the cab company, for which he was to receive as compensation one-half of any amount recovered, either by settlement or suit; that notice of said agreement and lien was served on the cab company March 17, 1934; that thereafter, June 25, 1934, the cab

BENJAMIN J. SCHWARTZ,
Appellee.

v.

YELLOW CAB COMPANY, a
corporation, and JAMES
J. LEWIS and ANNA KATSEVER,
Defendants.

YELLOW CAB COMPANY,
a corporation.
Appellant.

APPEAL FROM THE
COURT OF COMMONS.

2011.A.6105

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, an attorney at law, filed suit in the Municipal
Court under the Attorney's Lien Act to recover from defendants
Yellow Cab Company, a corporation, (hereinafter referred to as the
cab company) and James and Anna Katsever, the sum of \$250 alleged to
be due him for legal services rendered and attorneys' fees pursuant to a
written agreement for legal services entered into with them. The
court heard the case without a jury, found in favor of defendants
Katsevers, and against the cab company, and entered judgment accord-
ingly. This appeal by the cab company followed.

The original statement of claim filed as plaintiff alleges
in substance that he entered into an agreement with Anna Katsever and
James Katsever to represent them in the enforcement of their claims
against the cab company for injuries sustained as the result of the
negligence of the cab company, for which he was to receive as
compensation one-half of any amount recovered, either by settlement
or suit; that notice of said agreement and lien was served on the
cab company March 17, 1934; that thereafter, June 22, 1935, the cab

company paid to the Estavers the sum of \$400 in settlement of their claims but have failed and refused to pay plaintiff one-half thereof as agreed, for which plaintiff asked judgment. Under a supplemental statement of claim plaintiff sought also to recover against defendants Estavers upon a quantum meruit.

The cab company's affidavit of merits averred that it did not make any settlement of the Estavers' claim during the life of plaintiff's contract, and that the agreement between plaintiff and the Estavers was terminated by mutual consent of the parties long prior to any transactions had between the Estavers and the cab company.

The affidavit of merits filed by the Estavers denied that they had entered into such a contract as was alleged in the statement of claim; averred that plaintiff was employed by them to prosecute their claim against the cab company, but that plaintiff subsequently withdrew therefrom and surrendered his contract of employment, advising James Estaver that he would have nothing further to do with the adjustment or transaction of their claims; and that upon plaintiff's withdrawal they negotiated with the cab company and adjusted their respective claims and never became indebted to plaintiff in the sum of \$200 or in any other sum.

It is difficult to understand upon what theory the court released the Estavers from liability and rendered judgment against the cab company, for, if the court by its finding held the contract of employment to have been in existence the Estavers should have been held jointly liable with the cab company. On the other hand, if the court by its finding was of the opinion that the contract had been surrendered, as both the Estavers and the cab company contended, there could have been no valid judgment against the cab company, because, as held in People v. Holten, 304 Ill. 394, 398, "an attorney's lien, under the statute, must be based upon some contract for fees, either express or implied, entered into by clients capable of so con-

company paid to the defendant the sum of \$1000 in satisfaction of their claims but have failed and refused to pay plaintiff on a bill of exchange as agreed, for which plaintiff asked judgment. There is a signed statement of claim plaintiff sought and to recover against defendant set forth upon a particular return.

The said company's affidavit of merits states that it did not make any settlement of the plaintiff's claim during the life of plaintiff's contract, and that the agreement between plaintiff and the defendant was terminated by mutual consent of the parties long prior to any transactions between the plaintiff and the defendant. The affidavit of merits filed by the defendant avers that they had entered into such a contract as was alleged in the statement of claim; avers that plaintiff was employed by them to prosecute their claim against the defendant, but that plaintiff subsequently withdrew therefrom and surrendered his contract of employment, leaving James Hester that he would have nothing further to do with the plaintiff's transaction of their claim; and that upon plaintiff's statement they negotiated with the defendant and returned their respective claims and never became involved in plaintiff in the sum of \$1000 or in any other sum.

It is difficult to understand upon what theory the court released the defendant from liability and rendered judgment against the defendant, for, if the court by its finding held the contract of employment to have been in existence the defendant should have been held jointly liable with the defendant. On the other hand, if the court by its finding was of the opinion that the contract had been terminated, as both the defendant and the defendant contended, there would have been no valid judgment against the defendant. Because, as held in English v. Bower, 304 Ill. 384, 307, the plaintiff's claim, under the statute, must be based upon some contract for labor, either express or implied, entered into by plaintiff capable of so con-

trolling the fund as to subject it to a lien by their contract."

The controverted question of fact presented for review is whether or not plaintiff abandoned and surrendered his contract before the settlement between the Estavers and the cab company was effected. The contract between the parties expressly provides that the Estavers are to pay "none of the expenses involved, if any there be." Plaintiff sought to procure a settlement of the Estavers' claims by negotiation with one Brine, agent for the cab company. No offers of settlement were made, and after several weeks of negotiation plaintiff surrendered the original and a copy of the written agreement to Mr. Estaver. Plaintiff explains this by stating that he returned the contract to Estaver to obtain his wife's signature, so the cab company would not question his authority. This explanation is not plausible, however. Plaintiff admits that no offer of settlement was ever made by Brine, and in fact Brine told plaintiff over the telephone, while Mr. Estaver sat by plaintiff's side, that he would make no settlement. It was at this time and under these circumstances that plaintiff surrendered both copies of the contract, and we regard this as a definite intention on his part to waive and abandon the contract. It is well settled that an attorney, having a valid agreement with his client, may waive or abandon the same, and if he does so is not entitled to recover under a claim of lien. (Wolf v. Shulz Folding Box Co., 44 S. W. (2nd), (Mo.) 866, 869; In re King, 61 App. Div. (N.Y.) 152.

After the abandonment of the contract by plaintiff, one Baldwin, acting for the Estavers, settled their claim. In doing so, copies of the abandoned contract were presented to the cab company, and under the circumstances the cab company was justified in making the settlement notwithstanding service of notice of the lien by plaintiff. Plaintiff's contract had been abandoned and the cab company so advised, and their settlement was not in derogation of

proceeding and that he is subject to the order of the court.
The court has found that the defendant is not a party to the
is a matter of fact and the court has found that the defendant
before the settlement between the parties and the court has
affected. The court has found that the defendant is not a party
the parties are to pay costs of the proceedings. It is the
part. Plaintiff seeks to recover a judgment of the court.
claim by negotiation with the bank, subject to the court's
No offer of settlement was made, and the court has found that
negotiation plaintiff's statement is correct and a copy of the
written statement to Mr. Brown. Plaintiff seeks to recover
stating that he received the money to recover in the case and
life's statement, so the court has found that the defendant's
This explanation is not plausible, however. Plaintiff seeks to
no offer of settlement was made by the bank, and the court
said plaintiff over the defendant, while Mr. Brown and the
life's life, but he would not be satisfied. It was at this time
and under these circumstances that plaintiff seeks to recover
of the contract, and he seeks to recover a judgment on the
paid no money and should not recover. It is well settled that
an attorney, having a valid agreement with his client, may waive or
suspend the same, and if he does so he is not liable to recover money
a claim of him. (See 100 N.Y. 2d 100, 40 N.Y. 2d 100.)
(No.) 360, 361; in 100 N.Y. 2d 100, 40 N.Y. 2d 100.)
After the settlement of the contract of plaintiff, and
Baker, acting for the defendant, failed to pay. It is found
copies of the documents referred to were furnished to the defendant,
and after the circumstances the court has found that the
the settlement notwithstanding the fact of the fact of
plaintiff. Plaintiff's statement that the defendant was the one
company to advise, and that plaintiff was not in agreement of

of any of plaintiff's rights.

Plaintiff's brief totally disregards rule 7 of this court. He raises no question as to the sufficiency of the abstract or of the statement of the facts, states no propositions of law, nor does he challenge any of the propositions urged by the cab company, but confines himself generally to a criticism of citations presented by defendant because they are from jurisdictions other than Illinois. Consequently, we have been unable to gain much enlightenment or assistance from plaintiff's presentation of his theory of recovery.

Upon careful examination of the evidence shown by the abstract of record, we are of the opinion that defendant's contentions are sound, and that the court erred in entering the judgment against the cab company. In view of our conclusion that there was an abandonment of the contract by plaintiff, it would serve no useful purpose to remand the cause for trial. The judgment of the Municipal court will therefore be reversed without remanding.

REVERSED.

Seanlan, P. J., and Sullivan, J., concur.

of Mr. Delia's father.

Delia's father's name is not known.

He raised no question as to the validity of the evidence.

as of the statement of the fact, which is given by Mr. Delia.

He does not challenge any of the propositions made by the

company, but confines himself generally to a criticism of the

statements by Delia's father, and to the fact that Delia's

then Illinois. Consequently, he has been unable to find any

confirmation or assistance from Delia's father's statements of his

theory of the case.

When a careful examination of the evidence is made by the

abstract of record, we see of the opinion that Delia's father's

statements are correct, and that the company's statements are incorrect.

Against the company. In view of our conclusion that Delia's

an abandonment of the contract by Delia, it would seem to be

purpose to return the same to Delia. The company in the meantime

will therefore be required to return the same.

Very truly,
Yours,

Wm. H. Delia, Esq.,
New York, N. Y., and Illinois, N. Y., and New York.

4211

37831

AMBASSADOR GARAGE CO., an
Illinois corporation,
(plaintiff below),
Appellant,

v.

JULIUS A. GOLDBERG, defendant
in cause Gen. No. 2197639 and
FRED E. HUMMEL, individually
and as receiver, defendant in
cause Gen. No. 2217641,
(defendants below),
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

281 I.A. 610³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

August 14, 1933, Ambassador Garage Company, plaintiff, brought suit against Julius A. Goldberg to recover charges of \$648, which it averred had accrued for the period from August 1, 1930, to August 14, 1933, for the storage of a Minerva automobile owned by him. Thereafter it filed an action against Fred E. Hummel, individually and as receiver, for \$756 storage charges on the same automobile for the period from August 1, 1930, to and including January, 1934. These suits were consolidated by an order entered by the Municipal court March 27, 1934, and after a hearing by the court without a jury finding and judgment were entered against plaintiff. This appeal followed.

The essential facts are practically undisputed. It appeared that during the month of January, 1930, Goldberg, through his chauffeur, placed the automobile in question in plaintiff's garage and paid the storage charges thereon of \$18 a month to and including July, 1930, during which period he used the car; that on July 30, 1930, Hummel, upon Goldberg's petition, was

appointed receiver of this Minerva automobile by the circuit court in a chancery proceeding therein pending, which had been brought by Goldberg against Minerva Automobiles, Inc., and others, February 21, 1930; that August 4, 1930, after his bond as receiver and Goldberg's bond as complainant had been approved by the circuit court, Hummel notified plaintiff of his appointment as receiver and by his agent took possession of the automobile by attaching thereto an appropriate sign indicating his custody and control; and that thereafter the automobile was not removed from plaintiff's garage by the receiver or Goldberg, nor was any storage charge paid to plaintiff on the car by any one subsequent to July 31, 1930.

For a proper understanding of the issues presented for our determination on this appeal we deem it necessary to set forth the history of the Minerva automobile involved and the circuit court proceedings with reference thereto.

Goldberg bought this car for \$15,000 from one Seltzer, who was connected with the Minerva Sales Company of Chicago, with warranties against certain defects, the sellers agreeing to accept a Minerva car which Goldberg owned as part payment to the extent of \$7,000 on the purchase price of the new car. Upon using the car the defects against which the sellers had warranted commenced to develop and they attempted repeatedly, but unsuccessfully, to remedy them. Thereafter Minerva Automobiles, Inc., of New York city, claimed that it owned the car and that Seltzer, its agent, who sold the car to Goldberg, had no title to it and no authority to make the contract. Goldberg, having elected to rescind the sale for breach of warranty, filed a bill in equity in the circuit court February 21, 1930, against Minerva Automobiles, Inc., the Minerva Sales Company and Seltzer to recover the consideration paid by him on account of the purchase price of the car and to foreclose his lien for the amount paid on the contract. Counsel representing

[illegible]

For a proper understanding of the issues involved in the
determination of the value of the property, it is necessary to
know the history of the property and the circumstances under which
it was acquired.

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plaintiff in this cause, which was not a party to the circuit court action, represented the defendants there and strenuously insisted that Goldberg had no right to invoke the aid of a court of equity, arguing that he had an adequate remedy at law by proceeding under the statute which gives the buyer the election, upon a breach of warranty, to rescind the sale and to recover the price paid. (Chap. 121a, par. 72, Cahill's 1933 Ill. Rev. Stats.) Contrary to defendants' contention there, the chancellor of the circuit court declared that equity had jurisdiction and entered a decree granting Goldberg the relief sought. This court in reviewing the decree of the circuit court in Goldberg v. Minerva Automobiles, Inc., et al., 278 Ill. App. 217, in an opinion written by Justice McSurely, said at pp. 222, 223:

"There is point to the suggestion that a Minerva automobile costing \$15,000 is an unusual article and no purchaser would bid an adequate price unless assured that he would obtain a good title. Complainant was compelled by the circumstances to foreclose his lien in equity where the question of the authority of the agent to sell would be settled, and the sale conducted under the supervision of the court in such a way that a purchaser could and would acquire an indefensible title, and where the interference by Minerva Automobiles Inc., with complainant's possession would be enjoined or prevented by the interposition of a receiver."

(Petition for leave to appeal this cause to the Supreme court was denied April 17, 1935.)

The instant case was tried in the municipal court, this appeal perfected and the briefs of the parties filed here prior to the filing of the opinion by this court on the appeal from the circuit court decree. Plaintiff's counsel devote a major portion of its briefs filed on this appeal to argument collaterally attacking the jurisdiction of the circuit court to appoint Hummel receiver of the automobile and to the assertion of Goldberg's liability for the storage of the car in plaintiff's garage after the receiver's appointment, because of the alleged lack of jurisdiction of that court to make such appointment. This court and the Supreme court having held that the circuit court had jurisdiction of the parties

and the subject matter in the proceeding there, the validity of the receiver's appointment is no longer open to question.

In view of plaintiff's utter failure to urge to this court any liability on the receiver's part, it is unnecessary for us to discuss that question except to state that it is the general rule that expenses incident to or services rendered in connection with property properly under the custody or control of a receiver by order of a court of competent jurisdiction can be chargeable only against the assets of the receivership estate in his hands.

What then of Goldberg's liability for the storage charges accruing after the appointment of the receiver? He had fully paid such charges up to that time. Was not the receiver's appointment, plaintiff's notification of same, and the receiver's taking possession of the automobile sufficient notice to plaintiff that it had to look elsewhere than to Goldberg thereafter for the payment of its storage charges? Plaintiff states that at the time its reply brief was written the charges for storage had accumulated for over four years and eight months and that the amount due it for same exceeded the value of the car. Plaintiff can blame only itself for the continued accumulation of charges. From the date the receiver assumed control under the court's order, the plaintiff had and still has a superior lien on the car for its storage, which it has not seen fit to enforce, and there was at all times available for the presentation of its claims the circuit court which appointed the receiver.

Goldberg fully discharged any contractual obligation he was under to plaintiff for the storage of the car prior to the receiver's appointment. We have examined that portion of the bill of complaint filed by Goldberg in the circuit court, which plaintiff contends constituted an admission that he was obligated to pay the storage charges on the car, even after the appointment of a receiver,

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24. The Board of Directors of the Corporation shall have the right to make and alter the bylaws of the Corporation, subject to the power of the stockholders to change or repeal the same.

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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For the purpose of this study, the following hypotheses were formulated:

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1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

and which it further contends the trial court erroneously excluded from the evidence. That bill was filed February 21, 1930, and alleged "your orator has been and is obliged to pay storage charges. * * * At that time Goldberg was obligated to and did pay the storage charges and continued to be so obligated and paid such charges until July 31, 1930, when the receiver was appointed. We find nothing in Goldberg's bill of complaint in the circuit court action that constituted an admission against interest as to him in this cause and are of the opinion that the trial court properly refused to admit same in evidence.

It has repeatedly been held that as soon as a receiver is appointed and qualifies he acts under the sole direction of the court; that the contracts he makes or the engagements into which he enters are in a substantial sense the contracts and engagements of the court; that the liabilities which he incurs are liabilities chargeable upon the property under the control and possession of the court and not liabilities of the parties; and that they have no authority over him and cannot control his acts. (Atlantic Trust Co. v. Chapman, 208 U. S. 360; Miller v. American Light and Fixture Co., 181 Ill. App. 623.)

In the case of Atlantic Trust Co., supra, further discussing this question, the court said at pp. 375, 376:

"When neither the order appointing a receiver * * * and when no special circumstances appear which, upon equitable principles, would authorize the court to fix liability upon the plaintiff for such expenses, the general rule should be applied which makes such expenses a charge upon the property or fund under the control of the court, without any personal liability therefor upon the part of the plaintiff who invoked the jurisdiction of the court. The mere inadequacy of the property or fund to meet such expenses constitutes in itself no reason why liability should be fastened upon the plaintiff, who has been guilty of no irregularity, and who, so far from seeking any improper advantage, has succeeded in his suit by obtaining the relief asked * * *."

Hummel, as receiver, was ordered by the circuit court "to take possession and charge of the said Minerva automobile, the subject matter of the suit herein, and to hold and dispose of same subject to

and which it further contends the trial court erroneously excluded from the evidence. That bill was filed February 21, 1930, and alleged "your order has been and is obliged to pay costs charges * * * that time Goldberg was obliged to and did pay the costs charges and continued to be so obligated and paid such charges until July 31, 1930, when the receiver was appointed. He filed nothing in Goldberg's bill of complaint in the circuit court action then constituted an admission against interest as to him in this regard and one of the opinions that the trial court properly refused to admit same in evidence.

It has repeatedly been held that as soon as a receiver is appointed and qualifies he acts under the sole direction of the court; that the contracts he makes or the engagements into which he enters are in a substantial sense the contracts and engagements of the court; that the liabilities which he incurs and liabilities chargeable upon the property under the control and possession of the court and not liabilities of the parties; and that they have no authority over him and cannot control his acts. (Standard Trust Co. v. Sherman, 208 U. S. 280; Miller v. American Light and Tissue Co., 181 Ill. App. 683.)

In the case of Atlantic Trust Co. v. Rogers, 178 Ill. 375, 376, on this question, the court said at pp. 375, 376:

"When neither the order appointing a receiver * * * and when no special circumstances appear which, upon equitable principles, would authorize the court to fix liability upon the plaintiff for such expenses, the general rule should be applied which makes such expenses a charge upon the property or fund under the control of the court, without any personal liability therefor upon the part of the plaintiff who invoked the jurisdiction of the court. The mere inadequacy of the property or fund to meet such expenses constitutes in itself no reason why liability should be fastened upon the plaintiff, who has been guilty of no irregularity, and who, so far from seeking any improper advantage, has succeeded in his suit by obtaining the relief asked * * *"

Similarly, as receiver, was ordered by the circuit court "to take possession and charge of the said business enterprise, the subject matter of the suit herein, and to hold and dispose of same subject to

the order and direction of this court." Pursuant to this order the receiver took possession of the car at a time when there were no storage charges due and plaintiff was bound under the law to look only to the assets of the receivership estate for the payment of any subsequently accruing charges.

Under the facts and circumstances of this case and the law applicable thereto, we are of the opinion that no personal liability attached to either Goldberg or the receiver for charges for storage of the car subsequent to the appointment of the receiver, and the judgment of the municipal court is therefore affirmed.

AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

the order and direction of this court. The court is this order
the receiver took possession of the car at a time when there was
no storage, because the car was damaged and being used for
load only to the extent of the receiver's estate for the purpose
of any subsequently occurring charges.

Under the facts and circumstances of this case and the
law applicable thereto, we are of the opinion that no personal
liability attached to either defendant or the receiver for charges
for storage of the car subsequent to the receipt of the
receiver, and the judgment of the trial court is affirmed.
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HIRAM C. DAGGETT,
Appellee,

v.

DAGGETT ROLLER CHAIR
COMPANY, a corporation,
Appellant.

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APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

281 I.A. 610⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal Daggett Roller Chair Company, defendant, seeks to reverse a judgment for \$1,867.81, rendered against it June 22, 1934, in favor of Hiram C. Daggett, plaintiff, in a first class contract action tried by the court without a jury.

Plaintiff's amended statement of claim alleged that on or about May 15, 1933, defendant, by and through its then president and general manager, A. F. Daggett, entered into a contract with plaintiff, employing him as assistant manager of the defendant corporation in active management of the "Rickshaw Concession," which defendant owned and operated at the Century of Progress Exposition; that he "was then and there employed by said defendant corporation for the duration of said exposition for the year 1933, on the following terms: A guarantee by the defendant of \$2,500 plus a monthly salary of \$125 or a salary of \$125 per month plus 5% of the gross receipts derived from the operation of the aforesaid 'Rickshaw Concession,' at the option of the plaintiff * * *; that the gross receipts of said concession were \$43,358.35; that plaintiff actively performed all his duties in connection with said employment and has in every respect performed and fulfilled all his covenants and agreements with respect to said contract of

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and the other two are the same as the first two.

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to ensure that the information is being used for the purposes for which it was collected.

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1. The first step in the process of the investigation is to identify the problem or the area of interest. This is done by the investigator who is responsible for the study. The investigator will then determine the objectives of the study and the methods to be used. The next step is to collect data, which may be done through interviews, surveys, or other means. The data is then analyzed and the results are reported. The final step is to draw conclusions from the data and to make recommendations based on the findings.

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It is not possible to give a complete list of the names of the persons who have been in contact with the subject of this report.

7. nois. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845

be referred to 'Mikoyan Gorbunov', as the origin of the name.

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2. The following information is being furnished to you for your information:

employment, but that defendant, though often requested by the plaintiff, has refused to pay to him the sums of money due from said contract, excepting the sum of \$300, which defendant has paid on account; to the damage of the plaintiff in the sum of \$2,200 and, therefore, plaintiff brings this suit."

The pertinent averments of defendant's affidavit of merits are that its only contract with plaintiff was to pay him \$125 a month for his services; that no contract such as plaintiff alleged in his statement of claim was ever entered into by the parties; that A. F. Daggett, its then president and general manager, had no authority to make contracts with employees "giving bonuses or other compensation in addition to salaries;" and that the "matter of any bonuses in addition to salaries was to be a voluntary action on the part of defendant, which it might or might not see fit to pay at the close of the 1933 exposition, and was determined by the defendant with reference to all employees in executive capacities during the 1933 season."

This was the second trial of this cause, the first trial before a jury resulting in a verdict for the same amount as the judgment appealed from here, which verdict was set aside and a new trial ordered.

It will be noted that the terms of the contract alleged by plaintiff are: "A guarantee by the defendant of \$2,500 plus a monthly salary of \$125 or a salary of \$125 per month plus 5% of the gross receipts derived from the operation of the aforesaid 'Rickshaw Concession,' at the option of plaintiff."

A. L. Daggett, president and general manager of defendant during the period covered by this controversy and until January 1, 1934, was plaintiff's uncle. At the outset of the second trial, the record of which is now before us, plaintiff's attorney made

employment, but that defendant, through other persons by the
plaintiff, has refused to pay to the plaintiff the sum of \$1000, which defendant has
will contract, reserving the sum of \$1000, which defendant has
paid on account, to the plaintiff in the sum of
\$1,000 and, therefore, plaintiff claims this sum.

The plaintiff's account of defendant's activities is

plaintiff and that the only contract with plaintiff was to pay him

1125 a month for his services; that no contract with plaintiff

alleged in his statement of claim was ever entered into by the

plaintiff; that, in fact, the same plaintiff and defendant entered,

had no authority to make contracts with plaintiff's firm or company

or other corporation in relation to defendant; and that the "master

of any business in relation to defendant was to be a voluntary action

on the part of defendant, which is what he wants to see to

pay at the close of the 1933 season, and was forfeited by the

defendant with reference to his activities in connection with

during the 1933 season."

This was the second trial of this cause, the first trial

before a jury resulting in a verdict for the plaintiff on the

judgment entered from hence, which verdict was not taken and a

new trial ordered.

It will be noted that the terms of the contract alleged

by plaintiff were: "as authorized by the defendant of \$1,000 plus

a monthly salary of \$125 or a salary of \$125 per month plus 5% of

the gross receipts derived from the operation of the company.

"Exclusive concession," at the option of plaintiff.

A. H. Deane, president and general manager of defendant

during the period covered by this controversy and until January 1,

1934, was plaintiff's agent. At the outset of the season 1934,

the record of which is now before us, plaintiff's company made

the following statement to the trial court: "Now, your honor, before commencing, I will make a brief opening statement, if you want me to, as to what the plaintiff expects to prove. I might say to the court this case has previously been tried and on this trial we are not making any claim here for the guarantee of \$2,500, because we do not feel that we had a sufficient amount of credible evidence to substantiate that claim as far as that guarantee is concerned. The only evidence we had was the testimony of the plaintiff, as against that of the president of the defendant corporation, so that we are going to confine our endeavor to recovering here upon the theory of a contract entered into about the 15th day of May, 1933, at which time it was agreed by and between the plaintiff and the defendant corporation that the plaintiff was to receive a salary as set out in the statement of claim and five per cent of the gross receipts of the Rickshaw concession."

Defendant's major contention is predicated on the theory that plaintiff, having alleged that his contract with defendant obligated it to pay him a guarantee of \$2,500 in addition to his salary, or his salary plus 5% of the gross receipts at his option, must prove that contract exactly as alleged before he can recover. It insists that he not only failed to prove the contract alleged in its entirety, but that he elected to rely on the alternative of the guarantee of \$2,500 plus his salary in that his statement and affidavit of claim asserted damages of \$2,300, which figure could only have been arrived at by deducting the \$300 theretofore paid plaintiff by defendant in addition to his salary from the \$2,500 guarantee alleged. It is further urged that plaintiff's counsel's statement to the court at the outset of the trial that he would not attempt to prove the contract of guarantee, but would rely entirely on proof of the contract for the alternative of 5% of the gross receipts, estopped him from recovery in any event because of his purported election by his

the following statement to the trial court: "Now, your honor, before commencing, I will make a brief opening statement. It was sent me to, so that the plaintiff's counsel, to prove, I think, by the court this case has previously been tried and so forth, first we are not making any claim here for the defendant of 1931, because we do not do it that we had a defendant known of standing evidence to substantiate that claim as far as that defendant is concerned. The only evidence we had was the testimony of the plaintiff, as against that of the president of the defendant corporation, so that we are going to continue our answer to the plaintiff's case upon the theory of a contract entered into about the year 1931, at which time it was agreed by and between the plaintiff and the defendant corporation that the plaintiff was to receive a salary as set out in the statement of claim and five per cent of the gross receipts of the defendant corporation."

Defendant's major contention is presented in the theory that plaintiff, having alleged that she entered into contract with defendant to pay him a percentage of 10% of the gross receipts of his company, of which she was to give 10% of the gross receipts of his company, must prove that contract actually entered into and not merely in it in that she has not only failed to prove the contract alleged in the answer, but that she failed to rely on the affirmative of the statement of 10% of the gross receipts of his company and 5% of the gross receipts of his company, which figure would only have been arrived at by assuming the 10% statement to be correct. It was in addition to the fact that the 10% statement was incorrect, is further urged that the plaintiff's statement is incorrect as to the facts of the case and that she failed to prove the contract of 10% of the gross receipts of his company and 5% of the gross receipts of his company, which figure would only have been arrived at by assuming the 10% statement to be correct. It was in addition to the fact that the 10% statement was incorrect, is further urged that the plaintiff's statement is incorrect as to the facts of the case and that she failed to prove the contract of 10% of the gross receipts of his company and 5% of the gross receipts of his company, which figure would only have been arrived at by assuming the 10% statement to be correct.

affidavit of claim to stand on his guarantee. It may well be that strict conformity to the rules of proper practice should have prompted plaintiff's counsel, when he decided to restrict the issue on the second trial to the alternative contained in the contract providing for 5% of the gross receipts, to have asked leave to amend his statement of claim accordingly. Under the terms of the alleged contract plaintiff had the option to declare which alternative of relief he would seek. As stated to the court, since the only proof available on the alleged guarantee was the affirmance of plaintiff on the one hand and the denial of the president of defendant corporation on the other, he preferred to prove the percentage alternative of the contract, as to which there was available the corroboration of witnesses as well as documentary evidence. In our opinion plaintiff had the right to say upon which basis under the alleged contract it would proceed to trial and we think that defendant's position that the mere amount of the ad damnum set forth in his statement and affidavit of claim constituted an election by plaintiff to seek relief only under the guarantee alternative in the contract is untenable.

No matter in what light we view the alleged contract, either as a unit or as to its alternatives, it relates to the same subject matter and is between the same parties. The relief sought under the contract proven by the evidence in this case is sustained by the allegations of the statement of claim. No real question of variance or surprise arises here. It is not as if one contract was alleged and the evidence proved an entirely different contract or a contract between different parties or one concerning an entirely different subject matter. This was not a written contract, but one that grew out of a series of conversations between plaintiff and defendant's president, and, although plaintiff's counsel advised the court that he would not rely on the guarantee alternative contained in the contract alleged because it was more difficult of proof than

the other alternative, there is evidence in the record that tended to prove the guarantee as well. In any event the trend of modern judicature is to liberally construe all pleadings with a view to doing substantial justice between the parties. (Ch. 110, par. 161 (3) Cahill's 1933 Illinois Revised Statutes.)

While it is claimed that plaintiff failed to prove the contract alleged as defendant interprets that contract, nowhere in plaintiff's brief is it even suggested or intimated, much less argued, that the evidence did not warrant the court's finding that a valid contract for plaintiff's services was entered into between plaintiff and defendant corporation, under the terms of which defendant agreed to pay him a salary of \$125 a month, plus 5% of the gross receipts of the "Rickshaw Concession" at the Century of Progress Exposition during the year 1933. It is undisputed that plaintiff's services were entirely satisfactory. Inasmuch as there is no contention that the finding of the trial court is against the manifest weight of the evidence on the issue tried, a review of the evidence will serve no good purpose.

It is also claimed that the president of a corporation has no authority as such to contract with an employee to pay him a bonus or premium of a substantial amount of the corporate income in addition to his regular salary without special authority from the board of directors. This contention is without merit and the authorities cited in its support are not applicable to the facts and circumstances of this case.

A. F. Daggett was president and general manager of the defendant corporation and even according to the testimony produced in defendant's behalf was the only person actively engaged in the prosecution of its affairs. He hired the employees and determined defendant's policies in its relationship with them.

We think the president of defendant corporation clearly

the other alternative, there is no reason in the law that should
to move the burden of proof. In any event, the fact of burden
jurisdiction is to be decided on all grounds with a view to
being established in the future between the parties. (See, also, pp. 101
(2) Cullin's 1932 Illinois Revised Statutes.)

While it is claimed that plaintiff failed to prove the
contract alleged as defendant's contract, nowhere
in plaintiff's brief is it even suggested or intimated that
defendant, that the evidence did not warrant the court's finding that
a valid contract for plaintiff's services was entered into between
plaintiff and defendant corporation, under the terms of which defendant
was agreed to pay him a salary of \$125 a month, plus 10% of the gross
receipts of the "Chicago Corporation" or the company of defendant
corporation during the year 1932. It is contended that plaintiff's
services were entirely gratuitous. Inasmuch as there is no
contention that the finding of the trial court is against the weight
weight of the evidence on the issue tried, a review of the evidence
will serve no real purpose.

It is also claimed that the payment of a corporation
has no authority or right to contract with an employee to pay him
a bonus or premium of a substantial amount of the corporate income
in addition to his regular salary without special authority from
the board of directors. This contention is without merit and the
evidence cited in its support are not applicable to the facts
and circumstances of this case.

A. W. suggest that defendant and plaintiff entered into the
defendant's corporation and even according to the defendant's position
in defendant's behalf and the only person actually engaged in the
procurement of the service. He cites the language and substance
defendant's position in its relationship with them.
We think the position of defendant corporation clearly

had the power to employ plaintiff on the terms stated. Where the president is given the power as general manager of the business with full direction and charge thereof he has power to do any act or make any contract that the president and general managing agent of such a corporation could do or make in the ordinary transaction of the corporate business, and prima facie has power to do any act which the directors could authorize or ratify unless special limitations or restrictions are put upon such power, of which the party dealing with him has notice. (14A C. J. 358, sec. 2217.) There was no evidence in this case that there was any limitation or restriction on the president and general manager's power to make the contract in question and if plaintiff was charged with notice of any such limitation or restriction the burden was on defendant to prove that fact. The general rule in this state is that the president of a corporation, as agent and representative, has power in the ordinary course of business to execute contracts and bind the corporation in so doing. He is by virtue of his office recognized as the business head of the company, and as a general rule any contract pertaining to corporate affairs within the general power of the corporation will, in the absence of proof to the contrary, be presumed to have been by authority of the corporation as one of the powers incidental to his office. (Bloom v. Vehon Co., 341 Ill. 200; Quigley v. MacQueen & Company, 321 id. 124; Lloyd & Co. v. Mathews, 223 id. 477.)

Other points have been urged and have received our consideration, but in the view we take of this cause we deem it unnecessary to discuss them.

Convinced that substantial justice has been done in this cause, the judgment of the municipal court is affirmed for the reasons indicated.

AFFIRMED.

Seanlan, P. J., and Friend, J., concur.

38141

BENJAMIN WEINTROUB, Plaintiff and
Petitioner Below, and B. K. Goodman,
Defendant Below,

Appellees,

v.

CHICAGO TITLE & TRUST COMPANY, as
Trustee under the Trust No. 29471,
S.J.T. Straus, Sidney H. Kahn,
Melvin L. Straus, Henry R. Platt, Jr.,
A. J. Weisberg, and Hugh McLennan,
Defendants and Respondents,

Appellants.

INTERLOCUTORY APPEAL

FROM ORDER OF SUPERIOR

COURT OF COOK COUNTY

APPOINTING A RECEIVER.

281 I.A. 611¹

PER CURIAM OPINION.

This is an interlocutory appeal from an order appointing a receiver pendente lite. The bill of complaint in the cause was filed by the owner of a certificate of beneficial interest under a trust agreement of January 15, 1933. The action was brought on behalf of the plaintiff and all others similarly situated and the defendants named were the Chicago Title & Trust Company, as Trustee under Trust No. 29471, S. J. T. Straus, Melvin L. Straus, Sidney H. Kahn, Henry R. Platt, Jr., Hugh McLennan, A. J. Weisberg and B. K. Goodman. The last defendant, Goodman, in his answer neither denies nor admits the allegations of plaintiff's bill but later joined in endorsing the petition asking for a receiver pendente lite.

The bill charges that on or about January 15, 1925, S. W. Straus & Co., a corporation and S. W. Straus & Co., a co-partnership, created a trust and issued bonds against it to the number of 12,575, which aggregated in amount \$8,000,000, secured by a mortgage on real estate known as the Chicago produce district. This real estate was in the name of the Chicago Title & Trust Company, as trustee under trust document number 14225, which was issued for the benefit of certain defendants, viz; B. K. Goodman, Hugh McLennan and A. J. Weisberg, as well as others unknown to the plaintiff. The property

DEFENDANT'S EXHIBIT, Plaintiff and
Petitioner below, and U. S. District
Court, District of Columbia,
Petitioner below.

v.

DEFENDANT'S EXHIBIT, Plaintiff and
Petitioner below, and U. S. District
Court, District of Columbia,
Petitioner below.

DEFENDANT'S EXHIBIT, Plaintiff and
Petitioner below, and U. S. District
Court, District of Columbia,
Petitioner below.

DEFENDANT'S EXHIBIT, Plaintiff and
Petitioner below, and U. S. District
Court, District of Columbia,
Petitioner below.

This is an introductory report from an order appointing
a receiver herein. The bill of complaint in the case was
filed by the owner of a certificate of beneficial interest under a
trust agreement of January 1, 1925. The action was brought on
behalf of the plaintiff and all other similarly situated and the
defendants named were the Chicago Title & Trust Company, as Trustee
under Trust No. 29471, and U. S. District Court, District of Columbia,
H. Kahn, Henry E. Kahn, and U. S. District Court, District of Columbia,
H. K. Goodman. The first defendant, Goodman, in his answer neither
denied nor admitted the allegations of plaintiff's bill but later
joined in enforcing the petition asking for a receiver herein.
The bill charges that on or about January 1, 1925, U. S.
Trust No. 29471, a corporation and U. S. District Court, District of Columbia,
created a trust and issued bonds against it to the amount of \$1,000,000,
which were sold in about \$2,000,000, secured by a mortgage on real
estate known as the United States District. This real estate was
in the name of the Chicago Title & Trust Company, as trustee under
trust document number 14225, which was issued for the benefit of
certain defendants, viz: H. K. Goodman, U. S. District Court, District of Columbia,
as well as others unknown to the plaintiff. The property

described in the trust deed is located on the west side of Chicago and bounded by West 14th Place; West 15th Street; South Racine Avenue and South Morgan Street. Plaintiff purchased one of said bonds of the original issue of the face value of \$500.00 at par.

The bill further charges that the Straus defendants in collusion with the other defendants, conspired together in order to obtain and retain control of the trust, and refused to divulge to any bondholder or group of bondholders the names or addresses of the various bondholders; that between the dates of June 1, 1929 and January 15, 1932, the Chicago Title & Trust Company, as trustee, paid dividends, interest, taxes and other obligations, although said dividends and other payments were made out of their own funds and that the Strauses well knew that the said dividends and other charges were not earned, but caused these payments to be made in order to deceive the bondholders; that the Straus defendants accumulated a number of bonds in order to enable them to foreclose the trust deed and on January 15, 1932, the defendant Melvin L. Straus did file his bill of complaint praying for foreclosure of the lien of the trust deed securing the bond issue, of which plaintiff was one of the bondholders; that upon the filing of said bill of complaint, a bondholders protective committee was formed and the bondholders were for the first time advised of the default and a demand was made by the committee for the deposit of the bonds; that said committee took into the combination the defendants Benedict K. Goodman, Hugh McLennan and A. J. Weisberg and the said defendants conspired and cooperated together in furtherance of the scheme; that on July 10, 1932, a decree of foreclosure and sale was entered and the property was bid in for a supposed consideration of \$950,000, out of which they disbursed \$237,500 as trustee fees, committee charges, attorneys' fees, etc.; that immediately after the sale a

[illegible]

The bill further changes the law by providing for the
collusion with the other defendants, defendant's conduct is such as to
obtain and retain control of the trust, and subject to the
any bondholder or group of bondholders the right of control of
the various bondholders; that between the date of issue of 1935
and January 1, 1937, the date of the first dividend, the trust
paid dividends, interest, taxes and other obligations, although
paid dividends and other payments were not made to the bondholders
and that the trustees well knew that the dividends and other
payments were not earned, but received these payments as if they were in

order to receive the proceeds; that the United States
accumulated a number of bonds in order to enable them to foreclose
the trust deed, and on January 10, 1909, the defendant received
Stevens and wife his bill of exchange payable for foreclosure of the
lien of the trust deed securing the bond issue, of which plaintiff
was one of the bondholders; that upon the filing of said bill of
exchange, a bondholders protective committee was formed and the
bondholders went for the first time advised of the details and
demand was made by the committee for the deposit of the bonds; this
said committee took into the possession the defendant property
Cochran, John Robinson and J. J. Tolson, and the said defendant
consented and cooperated together in furtherance of the scheme;
that on July 10, 1909, a decree of foreclosure and sale was entered
and the property was sold in New England States Bank, Boston,
out of which they disbursed \$15,000 as trustee fees, commissions
attorneys' fees, etc.; that immediately after the sale

plan for a reorganization was entered into, but the plaintiff was unable to secure a copy of the same. Plaintiff charges, however, that the property bid in was conveyed to the Chicago Title & Trust Company, as trustee, subject to the directions of six individual trustees which were appointed by the defendants and comprised Goodman, McLennan and Weisberg, together with S. J. T. Straus, Sidney H. Kahn and Henry R. Platt, Jr.; that under the agreement, all questions of policy and conduct of the trust for a period of 20 years were to be confined to Kahn, Straus and Platt, under the designation of produce trustees; that the bondholders were required by said plan to take new bonds of a face value equal to 70% of their original bonds and which were merely income bonds and provided that the principal became due January 15, 1948, with interest at 5%, payable out of net income only, as, when and if earned. These new bonds were denominated respectively "class A preference shares" and "common shares" of Chicago produce district trust; that the defendant Hugh McLennan was awarded a six year exclusive contract for the management of the property with a commission of 4% on the annual income of said property up to \$450,000 and 5% on the income above that amount; that said reorganization plan provided for the redemption of bonds, etc. and that the Straus defendants profited by commission on sales of the original bond issue and, by the agreement with the other defendants, completely control and manage the property; that by their action the defendants have depressed the price of the new bonds and they are now and have been for sometime purchasing these bonds in the open market in order to secure the possession of the property at the expense of the bondholders; charges waste and mismanagement and excessive fees and commissions and prays the appointment of a receiver pendente lite and an accounting upon final consideration of the cause.

Plan for a corporation was entered into, but the plaintiff was unable to secure a copy of the same. Plaintiff alleges, however, that the property did in fact convey to the Chicago Title & Trust Company, as trustee, subject to the direction of six individual trustees which were appointed by the defendant and consisted of Goodman, Hollander and others, together with J. J. Burns, Sidney L. Kahn and Harry J. First, Jr.; that under the agreement all questions of policy and payment of the trust for a period of 20 years were to be confined to them, alone and first, under the designation of proper trustees; that the beneficiaries were required by said plan to take new bonds of a face value equal to 75% of their original bonds and which were made payable to them and provided that the principal payable on January 1, 1924, with interest at 5% payable out of net income only, as soon as it earned. These new bonds were designated respectively "Class A preference shares" and "Common shares" of Chicago Title & Trust Company; that the defendant Hugh Hollander was awarded a life term exclusive control for the management of the property with a compensation of 5% on the annual income of said property of \$1,000,000 and 5% on the income above that amount; that said corporation shall provide for the redemption of bonds, etc. and that said defendant shall be entitled to receive on sale of the original bonds and, by the agreement with the other defendants, control and manage the property; that by their action the defendants have represented the price of the new bonds and they are not and have never been entitled to receive any cash. Bonds in the open market in order to secure the redemption of the property at the expense of the bondholders; charges were and are management and executive fees and commissions and pays the expenses of a trustee Chicago Title and an accounting upon final completion of the same.

To this bill of complaint defendants filed their answers denying any collusion or concerted action in the management of the property, but affirm that the large business enterprise involved has been conducted with efficiency and success and deny each and every allegation of mismanagement.

The matter was referred to a master in chancery to take testimony and several months were consumed and several hundred pages of testimony taken, prior to the filing of the petition herein asking for the appointment of a receiver pendente lite.

Upon the hearing on the motion for a temporary receivership, the court considered the bill and answers, the petition of the complainants asking for the appointment of a receiver and the evidence taken before the master, which was certified to him for his consideration on the motion. The chancellor also heard arguments and the statements of counsel and took the matter under advisement and rendered his opinion to the effect that the best interests of all would be conserved by the appointment of a temporary receiver, and, it is from this order that the interlocutory appeal has been taken.

The entire transaction appears to have resulted in the formation of a common law trust, the purpose of which was to create a general produce exchange or market, as a substitute for what was known as the old South Water Street Market in Chicago. The land was purchased and buildings erected which were leased to tenants or sold on the partial payment plan. The evident purpose was a real estate improvement which was to be disposed of within a period of time and, as a necessary requisite and incident thereto, it became necessary to run and manage the property until its final disposition and the conclusion of the plan.

The petition in the cause asking for the appointment of a receiver pendente lite charges that the allegations of the bill

To this bill of complaint the defendant has made answer denying any collusion or concerted action in the management of the property, but stating that the same business transactions have been conducted with efficiency and honesty and that no such every effort to defraud.

The answer was returned in a timely manner in answer to the testimony and several parties were examined and several answers given of testimony taken, with the result of the parties herein named for the appointment of a receiver herein filed.

Upon the filing of the petition for a receiver, the ship, the goods contained in the bill of lading, the petition of the complainant asking for the appointment of a receiver and the evidence taken before the court, which was certified to and the bill of lading of the ship, the goods contained in the bill of lading and the statements of goods and bills of lading were filed and rendered his opinion in his report that the best interests of all would be served by the appointment of a temporary receiver, and, as is from this court that the temporary receiver has been taken.

The entire transaction appears to have resulted in the formation of a common law trust, the purpose of which was to secure a general release of the goods, as a substitute for that was known as the old South Sea Island trust in 1890. The land was purchased and buildings erected which were leased to tenants on a long term on the basis of a cash rent. The present purpose was a real estate improvement which was to be disposed of within a period of time and as a necessary result of the building thereon, it became necessary to run and manage the property until the final disposition and the conclusion of the plan.

The petition for the same being for the appointment of a receiver herein filed against the defendant in the bill

have been sufficiently disclosed by the proof taken to substantiate the facts charged therein and that the record discloses that the defendants have in no way cooperated in the production of proof, but have consistently attempted to delay the hearings; charges further that the entire transaction had been dominated by the members of the firm of Straus & Co. and that the associated directors had been working in cooperation with them and that one Hugh McLennan had been appointed manager of the property at a high salary and that he has contracted with his own contracting firm for repairs and betterments upon the property at a profit to himself; charges further that the insurance on the property and buildings have been placed with the Stephens Agency, Incorporated, which is owned and controlled by the Strauses and that since the filing of the bill the defendants have been purchasing bonds on the market at a price below that designated as the value of plaintiff's bond, and those of other bondholders, and that many of such purchases have been made in part through concerns controlled by the defendants; that all the charges for operating expenses have been audited by the accountant employed by the McLennan Construction Company, of which the defendant McLennan is the head and that bank accounts are carried in the American National Bank & Trust Company, which is under the control of the Strauses; that petitioner believes that the Strauses have received commissions and fees and have made divers charges for handling interest payments, retiring bonds and in sinking funds, payment of taxes and other alleged services; charges that the taxes have not been paid and that large sums were paid for attorney's fees, etc.

To these allegations the defendants reply that the expenditures for attorney's fees and other expenses were in and about the foreclosure suit and, therefore, were not involved in the

have been sufficiently disclosed by the facts herein to show that the facts charged therein are true and correct and that the defendant here in no way cooperated in the perpetration of the same, but have consistently attempted to bring the same to light; and that the entire transaction was well known to the members of the firm of Strass & Co. and that the associated members well known working in cooperation with each other and with the defendant and have appointed manager of the property in a high capacity and that the defendant with his own contributions and the efforts of the defendant upon the property at a profit of \$10,000; and that the defendant has insurance on the property and contains the same and contains in the telephone agency, Incorporated, which is owned and controlled by the defendant and that since the filing of the bill the defendant have been purchasing bonds on the market at a price well over par value as the value of plaintiff's bond, and those of other securities, and that many of such securities have been sold in great volume concerning controlled by the defendant; that all the proceeds from such stock expenses have been utilized by the defendant in the purchase of the defendant's business; that the defendant's business is the head and that bank accounts are carried in the various banks; Bank & Trust Company, which is under the control of the defendant; that defendant believes that the defendant have received securities and have and have made large charges for handling interest payments, interest bonds and in making loans, payment of taxes and other alleged services; that the taxes have not been paid and that large sums were paid for attorney's fees, etc.

It is shown also that the defendant held that the attorney for defendant's bond and other expenses were in and about the defendant's only and, therefore, were not involved in the

question as they had been concluded by the foreclosure proceedings and were not, therefore, cognizable upon the application for this receivership.

While it is true that a great many of these expenses were considered on the prior foreclosure proceeding, nevertheless, it is also interesting to note that the common law trust under consideration here had already had financial reverses, as a result of which it was necessary to organize a bondholders' committee and reduce the value of the outstanding bonds in the hands of plaintiff and others. This naturally would result in suspicion at least on the part of those financially interested who were not included in the direct management of the property.

We are referred to the case of Jackson v. Metropolitan Funeral System Association, 268 Ill. App. 302, opinion by this court. That was an action against a corporation and the court in its opinion recognized the fact and held that courts should not interfere with the internal management of a corporation by the appointment of a receiver where the facts would not warrant the taking of the control of the property out of the hands of its proper officials. In that case, however, it appears that it was an action by a creditor and the court recognized the right of the chancellor to enter a restraining order prohibiting the expenditure of money for anything other than actual operating expenses.

This court has repeatedly held that upon an interlocutory appeal, it will not try the issues between the parties or go into the merits of the controversy. As a general rule it may be stated that the order appointing a receiver pendente lite by the court of first instance will not be reversed unless there is a clear abuse of discretion. The purpose of the statute, providing for interlocutory appeals, was, primarily, to require an orderly hearing upon due notice given and after a proper consideration by the court of the questions involved.

question as they had been concerned by the Government's investigation and were not, therefore, considered as having been investigated for their responsibility.

While it is true that a great deal of time and effort was expended on the price investigation, especially in the early stages, it is also interesting to note that the Government has found that the investigation here had already had financial reverses, as a result of which it was necessary to organize a bondholders' committee and request the value of the outstanding bonds in the hands of officials and others. This naturally would result in a situation at least on the part of those financially interested who were not included in the first investigation of the property.

We are referred to the case of Johnson v. Johnson.

Johnson v. Johnson, 202 Ill. App. 2d, 202 Ill. App. 2d, 202 Ill. App. 2d, which is the case that was an action against a corporation and the court in the opinion recognized the fact and held that the corporation should not interfere with the internal management of a corporation by the corporation of a receiver. Where the facts would not warrant the taking of the control of the property out of the hands of the proper officials. In that case, however, it appears that it was an action by a creditor and the court recognized the right of the corporation to enter a restraining order prohibiting the expenditure of money for anything other than actual operating expenses.

This court has recently held that when a receiver is appointed, it will not try the issues between the parties or go into the merits of the controversy. It is a general rule that it may be assumed that the order appointing a receiver is binding upon the court of first instance will not be reversed unless there is a clear abuse of discretion. The purpose of the statute, providing for the appointment of a receiver, is to require an orderly liquidation of the assets of the corporation and after a proper consideration of the court of the questions involved.

The values underlying the common law trust here involved is that of the real estate. The operation of the business is incidental thereto. The business of operating the trust does not bear the earmarks of a general corporation engaged in a manufacturing or mercantile business, inasmuch as there is no good will involved and no profits other than that derived directly from the income from the realty.

This court cannot say that the chancellor abused his discretion when he undertook, by the appointment of a receiver pendente lite, to preserve the property until a final disposition of the cause.

For the reasons stated in this opinion, the order of the Superior Court appointing a receiver pendente lite is affirmed.

ORDER AFFIRMED.

The volume underlying the motion for summary judgment is that of the year ending, the conclusion of the business is incidental thereto. The business of operating the mine was not the subject of a general assignment of assets in a bankruptcy or reorganization business, inasmuch as there is no such assignment and no profits other than that derived directly from the mine from the twenty.

This court cannot say that the disclaimer is a disclaimer when he understood, by the assignment of a receiver, pendente lite, he preserves his property until a final disposition of the same.

For the reasons stated in this opinion, the motion of the Superior Court appointing a receiver pendente lite is affirmed.
 ORDER GRANTED.

38216

In the Matter of the Estate of
ELIZABETH G. WATERBURY, Minor.

457
} APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

281 I.A. 611²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in this case and the law applicable thereto have been fully considered in Case No. 38215, In Re Estate of Joseph Lalla, Incompetent, in which an opinion has been this day filed. In conformity with the views expressed in that opinion, the judgment of the Circuit court of Cook county will be in this case also, as there, affirmed.

AFFIRMED.

McSurely, P. J., and O'Conner, J., concur.

38217

In the Matter of the Estate of
LA VERNE LUCILLE KELLOGG and
SHIRLEY ADRIELLA KELLOGG, Minors.

46 7
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

281 I.A. 611³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in this case and the law applicable thereto have been fully considered in Case No. 38213, in Re Estate of Joseph Lalla, Incompetent, in which an opinion has been this day filed. In conformity with the views expressed in that opinion, the judgment of the Circuit court of Cook county will be in this case also, as there, affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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38283

HOWARD McCREERY,
Appellant,

vs.

LIBBY-OWENS-FORD GLASS
COMPANY, a Corporation,
Appellee.

477
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

281 I.A. 611⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages, predicated his right upon the provisions of Section I of the Occupational Disease Act, and Sections 12 and 13 of the Health, Safety and Comfort Act. After the case was at issue the Supreme Court in Parks v. Libby-Owens-Ford Glass Company, 360 Ill. 130, and Boshuizen v. Thompson & Taylor Co., 360 Ill. 160, declared these sections void for indefiniteness. By leave of court plaintiff then filed an amended complaint in which he sought to set up a common law cause of action against the defendant. The complaint was, on motion of the defendant, stricken because it failed to state a cause of action, and the only question involved is, whether there was a common law right of action for an occupational disease, as alleged in the amended complaint.

We have this day passed on this question in the case of Joe Sylvester v. The Buda Company, #38282, where we held there was no common law right of action to recover damages for an occupational disease. For the reasons stated in the opinion filed in that case the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

38124

ALBERT RUSSEL ERSKINE,
Appellee,

vs.

TWYCKENHAM LAND & INVESTMENT
COMPANY, a Corporation,
Appellant,
and HENRY R. LEVY,
Defendant.

5 3 A
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

281 I.A. 611⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The subject matter of this suit is the proceeds of a life insurance policy for the face amount of \$100,000, issued by the Sun Life Assurance Co. of Canada on August 6, 1930, upon the life of Albert Erskine, Sr., who was then president of the Studebaker Corporation, of South Bend, Indiana. The insured died July 1, 1933. The proceeds of the policy have been paid to Henry R. Levy, to whom the insured assigned the policy on February 11, 1933, by a written assignment absolute in form, which gave the assignee the right to collect and receipt for the proceeds and which was recorded at the home office of the company in conformity with the requirements of the insurance policy.

While the assignment was thus absolute in form, it was in fact made by Erskine, Sr., to provide additional security to an indebtedness of Twyckenham Land & Investment Co. to Levy, and this indebtedness having been either paid or provided for in full, Levy does not claim the proceeds of the policy, which, however, are claimed by the beneficiary named in the policy, Albert Russel Erskine, Jr., an adopted son of Erskine, Sr., whose claims are opposed by Twyckenham Land & Investment Co., a corporation organized under the laws of the State of Delaware, which makes demand for the proceeds under the assignment as modified by contract executed by Erskine, Sr., Levy and Twyckenham on March 25, 1933, and supplemented by a further agreement between the same parties

ALBERT E. BROWN, JR.
SPECIAL AGENT

AT

THE BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.
JANUARY 11, 1934

100-11111

RE: ALBERT E. BROWN, JR. (100-11111)

The subject matter of this case is the purchase of a life insurance policy for the face amount of \$100,000, issued by the New Life Insurance Co. of America on August 1, 1933, when the life of Albert E. Brown, Jr., was then residing at the residence of his mother, of 1000 14th Street, N.W., Washington, D.C. The proceeds of the policy have been paid to the estate of the insured assigned the policy on January 11, 1934, at a time when the insured was residing in New York City. The assignment was effected by the New York City and County of New York, which was then the assignor of the policy, and the proceeds of the policy were paid to the estate of the insured assigned the policy on January 11, 1934, at a time when the insured was residing in New York City. The assignment was effected by the New York City and County of New York, which was then the assignor of the policy, and the proceeds of the policy were paid to the estate of the insured assigned the policy on January 11, 1934, at a time when the insured was residing in New York City.

While the assignment was then made in New York City, it was in fact made by Brown, Jr., as stated in the assignment made to the New Life Insurance Co. of America, a corporation organized under the laws of the State of New York, which was then the assignor of the policy, and the proceeds of the policy were paid to the estate of the insured assigned the policy on January 11, 1934, at a time when the insured was residing in New York City. The assignment was effected by the New York City and County of New York, which was then the assignor of the policy, and the proceeds of the policy were paid to the estate of the insured assigned the policy on January 11, 1934, at a time when the insured was residing in New York City. The assignment was effected by the New York City and County of New York, which was then the assignor of the policy, and the proceeds of the policy were paid to the estate of the insured assigned the policy on January 11, 1934, at a time when the insured was residing in New York City.

dated April 20, 1933. Plaintiff filed his bill to establish his alleged right as beneficiary. Defendant Twyckenham answered claiming under the assignment and contract of March 25, 1933, as modified. Levy answered that he was ready to pay presently \$39,169.60, upon the payment of the balance of the debt which the policy was pledged to secure.

The chancellor found that the equities were with plaintiff; that the assignment to Levy was made to secure an indebtedness of one Annenberg on a note for \$200,000, payable in installments; that Annenberg had paid this indebtedness except \$50,000, which would become due February 28, 1936; that under the terms of the agreement of March 25, 1933, supplemented by the agreement of April 20, 1933, Levy was entitled to retain in pledge an amount equal to the unpaid balance of \$50,000, principal, together with interest; that he, Levy, was ready to pay the sum of \$39,169.60 and the remainder upon payment by Annenberg of the balance due from him with interest; that plaintiff as beneficiary named in the policy was entitled to the proceeds aggregating \$93,669.60, subject only to the claim of Levy as pledgee, and that Twyckenham had no right, title or interest in the proceeds of the policy. From the decree entered Twyckenham prosecutes this appeal.

It seems best to summarize other material facts. The policy provided:

"BENEFICIARY--This policy is issued with the express understanding that the assured may, provided he has not assigned it or any interest therein, (a) change the beneficiary or beneficiaries from time to time during the continuance of this policy by filing with the Company a written request in such form as the Company may require, accompanied by this policy, such change to take effect only upon the endorsement of the same on the policy by the Company; (b) without the consent of the beneficiary, surrender, assign or pledge this policy and receive, exercise and enjoy every benefit, right and privilege conferred upon the assured by the terms of this policy."

Article 13:

"No assignment of this policy shall be binding upon the Company unless in writing and until filed at its head Office. The Company assumes no responsibility for the validity of any assignment."

These provisions were inserted at the request of Erskine, Sr., who in his application, in response to an interrogatory, stated that he reserved the right to change the beneficiary at any time, provided the policy had not been assigned.

The policy as originally issued named as beneficiary the executors, administrators and assigns of the insured.

On April 13, 1932, Twyckenham Land & Investment Co. borrowed from Levy \$200,000, for which it gave its note secured by a mortgage on Florida real estate. This loan was made at the request of Erskine, Sr., who controlled and practically owned the corporation. He deposited with Levy as additional security a large amount of stock of the Twyckenham company and two life insurance policies on his own life, one of which was the policy involved in this case. On August 8, 1932, by agreement between Levy and Erskine, Sr., Levy returned to Erskine, Sr., the two insurance policies and substituted therefor a policy in the Mutual Life Insurance Co. for \$250,000, which was delivered to Levy as additional security for the loan made to Twyckenham Land & Investment Co.

September 14, 1932, Erskine, Sr., changed the beneficiary of the policy, substituting plaintiff, and the Insurance company endorsed the name of plaintiff as beneficiary on September 20, 1932.

February 27, 1933, (again by agreement) Erskine, Sr. withdrew from Levy the policy of the Mutual Life Insurance Co. and deposited with him in lieu of the same three life insurance policies aggregating in amount \$230,000, one of these being the policy involved in this suit. Erskine, Sr., who controlled and practically owned Twyckenham, thereafter desiring to dispose of the Florida

real estate and to pay the indebtedness to Levy, caused Twyckenham to make a sale of the same to M. L. Annenberg. In part payment of the purchase price Twyckenham took the note of Annenberg for \$200,000, payable in installments of \$50,000 each on or before April 28, 1933, August 28, 1933, August 28, 1934, and February 28, 1936, respectively. Twyckenham negotiated payment of its indebtedness to Levy by transferring to him this Annenberg note and mortgage. There was a disparity between the amount of these respective indebtednesses, and Levy desired additional security.

To provide for this situation an agreement in writing dated March 25, 1933, by Levy as first party, Twyckenham Co. as second party, and Erskine, Sr., as third party, was made. It provided in substance that Twyckenham Co. sold the Annenberg note to Levy; that Levy cancelled and returned the note and mortgage of Twyckenham and surrendered to Erskine, Sr., the life insurance policies and other collateral which had been delivered to him. It further provided that Twyckenham deposited with Levy \$20,000 in cash, with the agreement that it should be returned from the proceeds of the first installment paid by Annenberg on his note.

As further security for the payment of the Annenberg note, Erskine, Sr., deposited with Levy the insurance policy in controversy, which had theretofore been duly assigned to him, Levy promising to pay the premiums thereon. This agreement further provided that the proceeds of the life insurance policy if collected should be applied to the reduction of the amount due to Levy on the Annenberg note, and that the balance should be paid over to the person or persons legally entitled to receive the same, and upon full payment of the Annenberg note before the death of Albert R. Erskine, Sr., the policy was to be returned to him. This agreement of March 25th as to the third clause thereof, which provided for the application of the proceeds of the policy to the payment of the Annenberg note

and the balance to the person or persons legally entitled, proved unsatisfactory for various reasons, and on April 20, 1933, the supplemental agreement by the same parties was executed.

This supplemental agreement recites that it is made for the purpose of modifying or correcting paragraph 3 of the original agreement, which should be made to read as set forth in the supplemental agreement. It provides that Erskine deposits the policy with Levy to secure \$180,000 of the principal sum of the Annenberg note (being the amount of the principal which Levy was entitled to receive, excluding the portion of the payment to which Twyckenham was entitled out of the payment to be made by Annenberg on April 26, 1933) with interest and other charges; that Erskine has the right but is not obligated to pay the premiums thereon, which may, however, be paid by the holder of the Annenberg note, although such holder shall not be obligated to do so; that out of the proceeds received by him from such policy, Levy shall retain (1) premiums paid by him with interest at 7 per cent, (2) charges, costs and attorney's fees, (3) an amount equal to the unpaid balance of principal and interest then unpaid on the Annenberg note, or any sum which may thereafter become due thereon, including all expenses of collection and attorney's fees. It further recites:

"Any balance thereafter remaining from the amount received by the first party on such life insurance policy, shall be by first party paid over to second party, or to such other person or persons as are legally entitled to receive the same.

In the event said Annenberg shall pay said entire principal note in the sum of Two Hundred Thousand Dollars (\$200,000.00), together with interest thereon, and including all attorney's fees and costs of collection, then and thereafter first party agrees to pay to second party the amount of the proceeds received on said insurance policy, then being held by first party to secure the payment of the balance of principal and interest due upon said note of M. L. Annenberg, as aforesaid."

Other provisions contingent upon the default of Annenberg in making payment of any principal or interest due need not be recited since that contingency has not occurred.

There is little doubt about the general rules of law applicable. The beneficiary of a life insurance policy, where the insured reserves the right to change the beneficiary, takes only an expectancy which does not arise to the dignity of a property right. In that case the insured may terminate this contingent interest. He may accomplish that result directly by compliance with provisions of the policy in that regard, or he may accomplish the same result by permitting the policy to lapse for nonpayment of premiums where it so provides, by surrendering it for its cash value, or through making an absolute assignment to another of all his right, title and interest in the policy. Such is the effect of an absolute assignment of a fraternal policy when made to a person within the class which the company was organized to protect. Martin v. Stubbings, 126 Ill. 387; Moore v. Guaranty Fund Life Society, 178 Ill. 202. Some cases distinguish between policies of mutual benefit societies and ordinary life insurance policies in this respect. Delaney v. Delaney, 175 Ill. 187; Fraund v. Fraund, 218 Ill. 189, and this distinction is recognized in later decisions. Modern Woodmen v. Faride, 335 Ill. 239; McElowney v. Metropolitan Ins. Co., 347 Ill. 66; Equitable Life Assurance Soc. v. Stilley, 271 Ill. App. 283. Ordinarily an assignment of a policy where the assignment is absolute in form but intended as security for a debt or other obligation will not cut off or terminate the rights of a beneficiary. Equitable Life Ins. Co. v. Mitchell, 248 Ill. App. 401. There is a fundamental difference between the assignment of a policy and the change of beneficiary, in that in an assignment there is a transfer of property right, while in a mere change of beneficiary, only the exercise of a right of appointment is required. (Douglas v. Equitable Life Ins. Co., 150 La. 519; Merchants Bank v. Garrard, 158 Ga. 867, 38 A. L. R. 102; Russell v. Cwen, 203 N. C.

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262; Lombard v. Balsley, 181 Ill. App. 1.) Where a policy is assigned to secure an indebtedness the rights of the beneficiary are not affected by such an assignment, except to the extent of the debts secured thereby. Union Trust Co. v. Chicago National Life Ins. Co., 267 Ill. App. 470; Katz v. Ohio National Bank, 127 Ohio, 531, 191 E. B. 782. Many other cases to the same effect from different jurisdictions might be cited. These cases, however, are not controlling here, for the reason that in none of them was the assignment absolute in form followed by a contract between the parties interested which assumed to dispose of the entire proceeds of the policy.

In its reply brief defendant distinctly disclaims any theory that here there was an assignment of the policy, or its proceeds, to Twyckenham. It says that there could be no such further assignment of the proceeds or policy because the proceeds were not in existence and because the policy itself had been theretofore assigned to Levy. The reply brief says:

"What we do contend is this: That in the contract of April 20, 1933, between Levy, Erskine, Sr., and Twyckenham, Levy agreed upon the happening of certain contingencies to pay the funds in controversy to Twyckenham. This agreement is to be regarded only as a contract by Levy to pay to Twyckenham, or as a declaration of trust by Erskine, Sr., in favor of Twyckenham. It cannot be considered as an assignment in any sense."

It is apparent we must turn to the supplementary agreement of April 20, 1933, for a determination of the rights of these parties, and the controlling question in the case seems to be narrowed down to the proposition of whether this modified Section 3 may properly be construed to contain such contract by Levy or such declaration of trust by Erskine, Sr.

Plaintiff has argued quite at length as to the meaning of the alternative clause, "or to such other person or persons as are legally entitled to receive the same." He argues that this means the beneficiary named in the policy; that is, plaintiff. He also argues that

by the fifth and sixth paragraphs of the agreement of March 25, 1933, which are modified by the later agreement of April 20, 1933, the amount which Twyckenham could take in any event was expressly limited to \$20,000, and that this is inconsistent with a construction which would give to Twyckenham the entire proceeds of the policy. This last contention is untenable for the reason that paragraphs 5 and 6 are limited by reference to the first payment of \$50,000 which Annenberg was to make to Levy according to the tenor of his note and the interest of Twyckenham therein which we have recited. In other words, these paragraphs have nothing whatever to do with the ultimate disposition of the proceeds of the insurance policy.

Moreover, any doubt as to the application or meaning of the alternative clause, which is argued quite at length by both parties, is, we hold, rendered unnecessary by the plain statement as to the provisions applicable: "In the event said Annenberg shall pay said entire principal note" etc., "First party agrees to pay to second party the amount of the proceeds received on said insurance policy." This "event" seems to have occurred and the promise contingent thereon is therefore obligatory and enforceable irrespective of other contingencies. If we might regard the contract as ambiguous in this respect, the letter of April 19th from the office of Levy's attorney transmitting the supplemental contract of April 20th to Erskine, Sr., would seem conclusive against plaintiff's contention. It says, "Accordingly I have provided * * that when the Annenberg note was paid then the proceeds of the insurance policy should be paid over to Twyckenham * *."

We hold that the effect of the assignment absolute in form of February 11, 1933, followed by the contracts of March 25th and April 20, 1933, and the happening of the contingency described has been to exhaust the entire proceeds of the policy, thus cutting

off the named beneficiary, for the simple reason that no property right in the proceeds remained at the death of Erskine, Sr., which would vest in Erskine, Jr., Levy by contract being then obligated to turn the entire proceeds remaining over to the Twickenham Land & Investment Co.

The decree of the Circuit court is therefore reversed and the cause remanded with directions to enter a decree in conformity with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

all the hands present, for the whole team had no money
left in the pockets of the team of horses, etc.
which would have been in the hands of the team of horses
obliged to turn the whole business over to the
typewriter and a typewriter.

The letters of the whole team in the whole business and
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with the whole business extended.

CLARENCE and HENRY
THE HENRY.

Admitted, F. J., and G. J., and H. J., and I.

38500

HERMAN S. STRAUSS as Trustee,
Appellant.

vs.

ROGERS PARK BUILDING CORPORATION
et al.,

Defendants.

E. G. SKINNER, E. C. SKINNER & COMPANY,
a Corporation, and B. F. GROBOLL,
Petitioners,

Appellees.

INTERLOCUTORY
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

281 I.A. 612¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Herman S. Strauss, who appeals, is trustee in a deed conveying to him real estate in Cook county, Illinois, to secure bonds to the total amount of \$349,000. He filed a bill to foreclose because of alleged defaults.

On August 19, 1931, upon motion made for the appointment of a receiver, in lieu of such appointment, an order was entered (all the solicitors of record having notice) that the premises with rents, issues and profits should be delivered to the trustee. The order recites that possession is given pursuant to agreement with the owner of the equity of redemption, and a copy of the agreement is attached to the order. The agreement provides that one Ebert shall be employed by the trustee as manager of the premises to serve without compensation; that the rents collected shall be placed by Ebert in the trustee's account in a responsible bank, and that the Superior court of Cook county shall have jurisdiction over the trustee and Ebert, the subject matter of the agreement and the respective rights of the parties.

On August 16, 1935, during the "summer vacation" of the Superior court, three holders of bonds (appellees herein) in the aggregate amount of \$9,000, filed a petition praying for the immediate appointment of a receiver. Notice that this application

would be made at 9:30 a. m. August 16th was given to attorneys of record on the day previous. For reasons and under circumstances hereafter explained, the trustee did not appear in opposition at the precise time the motion was called, and the court entered an order reciting that "upon a hearing in open court, the court finds that the premises are scant and insufficient security for the indebtedness sought to be foreclosed," that one Cohn be appointed receiver with the usual powers of a receiver in chancery, etc. The order further recited that the court having heard evidence in open court and for good cause shown, it was directed that the bond of petitioners be waived.

Three days later, on August 19th (the trustee having given notice on the previous day) filed a petition praying that the order of August 16th might be vacated. He also submitted in support of the petition the affidavit of Richard Weinberger. Judge David (who entered the order of the 16th) was not holding court on the 19th; the petition was therefore submitted to Judge Schwaba who permitted it to be filed but promptly entered an order denying its prayer. From the order of Judge David entered August 16th appointing Cohn receiver and the order of Judge Schwaba entered August 19th denying the motion of the trustee to vacate the order of the 16th, the trustee has perfected this appeal.

The petition of the trustee shows that in response to a notice his solicitor appeared before Judge David at the hour of 10:00 a. m. on August 16th for the purpose of resisting the motion for the appointment of a receiver; that the motion had been called before the trustee's solicitors or the solicitors for any of the other parties arrived in court; that at 10:30 a. m. of that day these solicitors all appeared before Judge David and requested an opportunity to be heard on the motion; that they were informed by Judge David that he would not hear the matter unless the attorney

for the moving party was present, and that it would be necessary for them to serve notice on the moving party and appear before a chancellor hearing motions of course on August 19, 1935.

The affidavit of Weinberger is to the effect that he appeared before Judge David at 10:00 a. m. on August 16th, in response to the motion; that the motion appeared on the motion of course book as Motion No. 11 on the second page of the motions; that he discovered the motion had been called and the order entered, although none of the parties notified to appear at the hearing of the motion were present in court; that the other solicitors appeared between 9:55 a. m. and 10:50 a. m. on August 16th, and that all of said solicitors requested Judge David to vacate the order appointing the receiver or to recall the attorney for the makers of the motion in order that the defense to the motion might be presented; that Judge David informed Weinberger and the solicitors that he would require notice to be served upon the attorney for the makers of the motion, and that the motion to vacate should be heard by Judge Schwaba.

The allegations of the petition of the trustee and of this affidavit in support of it with reference to the occurrences before Judge David on the morning of August 16th are not denied.

The petitioners in whose behalf the motion for immediate appointment of a receiver was urged set up in their petition that they were the holders and owners of bonds of the issue in question to the amount of \$9,000; that the trustee had instituted a proceeding to foreclose the trust deed; that the trustee had been in possession since August 18, 1931, and managing the premises; that no moneys were ever disbursed to the bondholders from the estate, although the estate was a valuable one and had a large income. The petition also averred "that the said Herman S. Strauss, as Trustee, is derelict and negligent in his duties and in order to protect the interests of the parties

in this suit and particularly the interests of your petitioners, a Receiver should and ought to be appointed for the premises herein."

The petition also called attention to the fact that Ebert, who was an officer of defendant corporation, was actually managing the premises; averred that the trustee was not under any duty to account to the court for receipts and disbursements, nor under duty to account to the petitioners and the other bondholders, and that the trustee had not accounted or reported to the court as to receipts and disbursements of the estate.

Such were the material averments of the petition upon which the court acted.

The petition of Strauss praying that the order of August 16th might be set aside, in addition to the facts already recited as to the circumstances under which the order was entered by Judge David, further set up that the trustee had a valid and meritorious defense to the motion in that the parties who moved for the appointment of a receiver were not parties to the proceedings and had no right to make any motion; that these persons had filed objections to a sale theretofore made and these objections had been referred to a master in chancery; that the petition on which the order appointing the receiver was based was insufficient, in that it did not state facts justifying the appointment; that the trustee had been in possession of the property since August 1, 1931; that he filed an accounting in the cause, which accounting was approved by the decree of foreclosure entered March 4, 1935; that under the terms of the trust deed the trustee was required to enter upon and take actual possession of the mortgaged property and collect the rents, issues and profits thereof; that he had done so in order to save the expense of receivership; that he had operated the premises efficiently and that the petition upon which the order appointing a re-

in this case and particularly the interest of your country,
a similar study and report is being made for the Commission

to-day.

The Commission has been working in the past year, and
has been able to secure the necessary information, and has been able to

make progress; and it is hoped that the Commission will be able to
submit to the next year the necessary information, and will be able to
to submit to the Commission and the other countries, and that
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year, and has been able to secure the necessary information, and has
been able to submit to the Commission and the other countries, and that
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which will be submitted to the Commission.

It is hoped that the Commission will be able to submit to the
the next year.

ceiver was entered did not charge him with fraud or mismanagement; that the property had been sold pursuant to the decree entered, and that the motion for confirmation of the sale was pending.

The petition of the trustee further alleged that the persons who moved for the appointment of a receiver were alleged to be the holders of only \$9,000 in bonds of a total bond issue of \$349,000, and that the trustee was informed by the Bondholders' Protective Committee (the holder of \$297,500 in bonds of the issue) that it was opposed to the appointment of a receiver for the property involved. The petition prayed that the order of August 16th appointing a receiver should be vacated and set aside.

The bare recitation of the facts as hereinbefore set forth indicates an abuse of discretion on the part of the chancellor in the appointment of this receiver. The trustee was entitled to possession upon default. (Altschuler v. Sandelman, 264 Ill. App. 106; Firebaugh v. Seegren, 269 Ill. App. 47; Rohrer v. Deatherage, 336 Ill. 450), and the fact as alleged by the petition that the premises were scant security for the amount due would not justify any order disturbing his possession.

It is suggested in petitioners' behalf that where the order appointing a receiver recites that the chancellor heard evidence in support of the motion, this court will not reverse in the absence of a certificate of evidence. First National Bank v. 10 W. Elm Street Bldg. Corp., 277 Ill. App. 337, and similar cases are cited. An examination of the order, however, justifies the inference that the evidence heard concerned the waiver of a bond on the part of petitioners rather than the merits of the controversy. From the facts disclosed with reference to the hearing on the motion, it is apparent that evidence concerning the issues was not heard, and even

if evidence had been heard proving all the averments of the petition, it would have been insufficient to justify the displacement of the trustee in possession.

The order of August 16th and August 19th will be reversed. McCurely, P.J., and O'Connor, J., concur.

REVERSED.

either was refused his last request for a trial or otherwise;
that the property had been sold pursuant to the decree entered, and
that the seller had satisfaction of his sale and payment.

The condition of the property after the sale was such
that it was not possible for a purchaser to be made as he was
informed at this time in order to a legal bond issue of \$100,000,
and that the property was retained by the bank, which, however,
was not in the position of a receiver for the property in-
debted. The condition of the property was such that it was impos-
sible to make a sale of the property and the bank was not able
to make a sale of the property and the bank was not able to make a sale of the property.

The bank's position in the case was such that it was not possible
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It is the opinion of the court that the bank was not able to make a sale of the property
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that it was not possible to make a sale of the property and the bank was not able to make a sale of the property.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

281 I.A. 612²

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 6 - 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District
February Term, A. D. 1935.

| | | |
|---------------------------|---|----------------|
| AUBREY L. HESSE, |) | |
| Plaintiff and Appellee, |) | |
| vs. |) | Appeal from |
| |) | Circuit Court, |
| OSCAR LUDWIG, |) | Kane County. |
| Defendant and Appellant.) |) | |

WOLFE -- P. J.

Aubrey L. Hesse started suit in the Circuit Court of Kane County against Oscar Ludwig to recover a balance of \$15,000 which he claimed was due him on a sale of 500 shares of stock of the Elgin Producers Milk & Butter Company. The suit is based upon a purported written contract signed by the defendant in which he agreed to pay \$62 per share for the said 500 shares of stock. The plaintiff also filed the common counts in the usual form.

The defendant filed several pleas. One of the general issue; another that the defendant had paid the plaintiff, who had accepted money and other things of value, to the amount of \$16,000, in full satisfaction and discharge of any claims that the plaintiff might have against the defendant. The defendant also filed a plea that he did not make sign or deliver the writing in the declaration mentioned. To these pleas the plaintiff filed replications. The case was tried before the court without a jury who found the issues in favor of the plaintiff and assessed his damages at \$17,437.50. This included the full amount of the plaintiff's demand of \$15,000 and interest at the rate of 5% from January 1, 1931, the date when the contract was signed.

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has to be reported

This case involved only a question of fact, viz.: Did the defendant sign the written contract for the purchase of this stock as shown by Plaintiff's Exhibit A? The defendant and his brother M. Stewart Hesse each testified positively that Aubrey L. Hesse drew the contract in the presence of Oscar Ludwig and that Oscar Ludwig in their presences signed this contract. The defendant testified positively that he did not sign it. Both plaintiff and the defendant introduced evidence of experts on hand writing. Some testified that the signature "Oscar Ludwig" on this contract is the true and genuine signature of Oscar Ludwig, and others stated it is not. The original contract was certified by the trial court to this court for our examination. Each member of this court examined the signature "Oscar Ludwig" on the contract with a microscope. The witnesses for the defendant's seemed to lay considerable stress on the fact that the letter "O" beginning the word Oscar, is not written in the same manner as in his admitted genuine signature. On this contract the beginning of the letter starts at the bottom and goes upward, whereas in the genuine signature the "O" invariably starts at the top and goes downward and then curves upward completing the letter "O". In examining the original contract with a glass it is plainly visible that in writing the "O" in question the party writing it did start at the top to make this letter. However the ink evidently did not flow on the pen, for a scratch or indentation is plainly discernable through the use of the glass. The name on the contract is written with a finer pen than the ones introduced in evidence as genuine signatures of the defendant, but aside from this, the court is unable to discern any difference in the two signatures.

The evidence shows that there was considerable negotiations between the parties before the deal was finally consummated; that the defendant wished to get control of the Elgin Producers Milk & Butter Company so that he could merge it with his company and have control of

both companies thereby eliminating competition; that in order for the plaintiff to get 500 shares of stock of the creamery company it was necessary for him to buy stock from other parties; that to get this stock it was necessary for him to trade in the home of his mother for which the court found the plaintiff paid his mother the sum of \$6,000.

There is no question but that the plaintiff did secure the 500 shares of stock and deliver them to the defendant for which he was paid the sum of \$16,000; or that the companies were reorganized and merged and the stock of the Elgin Producers Milk & Butter Company was valued at that time at \$75 per share. There was some testimony in regard to what the plaintiff said he was to receive for the stock, but the trial judge in his opinion stated that he did not place much reliance upon this testimony. The trial court is in a much better position to weigh the evidence of the various witnesses than a court of review.

From evidence submitted we are of the opinion that the trial court properly found the issues in favor of the plaintiff. The judgment of the trial court should be, and is hereby affirmed.

Judgment affirmed.

in connection with the conspiracy, that in order to
be eligible to be an officer of the company, it was
necessary for him to pay some other person; and to the
effect that it was necessary for him to have in his
pocket for which the court found the plaintiff paid his money, and
of \$10,000.

There is no question but that the plaintiff did receive the
3 shares of stock and holder was of the defendant for which he was
in the sum of \$10,000; or that the witnesses were instructed and
found that the stock of the Virgin Company with a further testimony
was given at that time of \$10,000. There was some testimony
related to what the plaintiff said he was to receive for the stock,
to the effect that it was a certain amount for the stock, and
likewise upon this testimony. The trial court is in a better position
than to weigh the evidence in the various instances and a court
review.

From evidence submitted as to the opinion that the
trial court properly found the facts in favor of the plaintiff. The
argument of the trial court is, that it is hereby affirmed.

Respectfully submitted,

STATE OF ILLINOIS, } ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

281 I.A. 612³

BE IT REMEMBERED, that afterwards, to-wit: On
April 6 - 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D., 1935.

| | | |
|------------------------|---|------------------|
| CHRISTIAN G. GARBER, |) | |
| (Plaintiff) Appellee, |) | |
| vs. |) | Appeal from |
| |) | Circuit Court, |
| CHARLES L. BOON, |) | Woodford County. |
| (Defendant) Appellant, |) | |

WOLFE * P. J.

Christian G. Garber, Appellee herein, started suit in Circuit Court of Woodford County against Charles L. Boon, Appellant, to recover damages arising as he claims, out of transactions between the two parties for the exchange of certain real estate. The appellee owned certain land in the city of Eureka. The appellant owned certain farm lands encumbered by a mortgage. A contract dated August 16, 1933, was entered into for an exchange of these properties. It provided that deeds were to be exchanged and possession of the land and lots were to be given on September 1, 1933. The appellee was to assume and pay two certain mortgages on the land of the appellant. One mortgage was for \$6,000.00; the other was for \$13,645.

The plaintiff claims that there was accrued interest on the \$6,000 mortgage of \$58.35, and on the \$13,645 mortgage there was an installment payment of \$468.75 due on November 1, 1933, which the plaintiff was compelled to pay. The complaint of the plaintiff (now appellee) contains two counts. The first sets out the contract and alleges a breach as of September 1, 1933, of the amount due on the

IN THE
APPELLATE COURT OF ILLINOIS

Second District
February Term, A. D. 1938.

CHRISTIAN G. CARPER, Appellant,
vs.
CHARLES L. BOON, Appellee.
Appeal from
Circuit Court,
Cook County.

WORTH * P. 3.

Christian G. Carper, Appellant herein, started out in
Circuit Court of Cook County against Charles L. Boon, Appellee,
to recover damages arising out of transactions between
the two parties for the exchange of certain real estate. The appellee
owned certain land in the city of Chicago. The appellee owned
certain farm lands elsewhere in a township. A contract was made
in 1935, was entered into for an exchange of these properties. It
provided that certain lots were to be exchanged and possession of the land
and lots were to be given on September 1, 1937. The appellee was to
assume and pay the mortgage balance on the land of the appellant.
One mortgage was for \$5,000.00; the other was for \$1,000.00.
The plaintiff claims that there was a breach of contract on
the \$5,000 mortgage of \$5,000.00 and on the \$1,000 mortgage there was
an installment payment of \$450.00 due on November 1, 1937, which the
appellant was unwilling to pay. The respondent of the plaintiff
(now appellee) contains two mortgages. The first sets out the contract
and alleges a breach on September 1, 1937, of the amount due on the

indebtedness, and asks that the plaintiff be reimbursed in the sum of \$524.90, claiming, that is the amount he had to pay to reduce the actual mortgage indebtedness to the sums of \$6,000 and \$13,645 as provided in the contract. In the second count of the complaint the appellee charges fraud and deceit, and alleges false representations as to the amounts due on the mortgage indebtedness and asks reimbursement as in count one. To this declaration the appellant filed a motion to dismiss the suit, which is in the nature of a demurrer. This motion was overruled by the Court. The appellant then filed an answer to the complaint. Trial was had before the court without a jury and judgment was entered in favor of the appellee in the sum of \$524.90. To review this judgment the case is brought to this court on appeal.

It is insisted by the appellant that the appellee could not maintain his suit because he had not fully complied with his part of the agreement and deeded to the defendant all the land specified in the contract. An examination of the records discloses that on cross examination, the defendant stated that while discussing the property, the appellee had told him that he had had three lots, but had sold one. Later in his testimony he states that he was to get the big house and two lots and these had been transferred to him. We see nothing in this contention to prevent the plaintiff from maintaining his suit.

It is next insisted that the Court erred in admitting oral testimony to vary the terms of a written contract. The appellant cites numerous authorities to sustain this contention. There is no question but that the rule laid down by many of the authorities, is that the terms of a written instrument cannot be varied by parole evidence. This suit is not based on the contract, but for damages for breach of a contract. One count of the complaint charges fraud in the inducement to the contract. In *Antle & Bro., v. Sexton et al.*, 137 Ill. 410., the

and said that the plaintiff on this point was not
 1.524.00, claiming, that in the amount of 10,000 and 10,000 was
 actual mortgage indebtedness at the time of 10,000 and 10,000 was
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 alleged fraud and deceit, and alleged that the defendant had
 counts due on the mortgage indebtedness and was claiming as in
 amount one. The defendant on the plaintiff filed a motion to dis-
 miss the suit, which is in the nature of a demurrer. This motion was over-
 ruled by the court. The defendant is entitled to answer to the plaintiff.
 The plaintiff was before the court at least a few days and judgment was entered
 in favor of the plaintiff in the sum of 10,000.00. The plaintiff will have
 and the case is brought to this court for appeal.
 It is insisted by the plaintiff that the plaintiff could not
 maintain his suit because he had not fully complied with the terms of
 the agreement and needed to the defendant all the time specified in the
 contract. An examination of the contract discloses that the contract was
 on, the defendant agreed that within a certain time he would
 pay the plaintiff his last and best price for the property, but had not done
 so. In his testimony he stated that he had not paid the plaintiff for
 the lots and these had been transferred to him. He was asked to
 the contract to prevent the plaintiff from recovering on it.
 It is next insisted that the court was in error in admitting the
 testimony to give the terms of a written contract. The plaintiff says
 errors authorities to show that this contract was in no way
 that the rule laid down in some of the authorities, is that the
 use of a written contract should be ruled by legal authorities. This
 rule is not based on the contract, but on the contract for the purpose of
 the contract. One count of the complaint is that the defendant
 the contract. In this case, v. [illegible], 107 Cal. 400, 190

same question was presented to our Supreme Court, and in discussing the case the Court states, "The action was not brought upon the contract, but upon false representation and deceit used to induce the plaintiffs to enter into the contract whereby they became damnified. It is well settled that such an action will lie though the parties may have entered into a written agreement and although in such agreement there may be a warranty or stipulation upon the points covered by the misrepresentation; as remarked by Chief Justice Nelson, in the case of Ward v. Wiman, the fraud is not merged nor extinguished by the covenant but affords additional and more complete remedy to the party. We are of the opinion the ruling of the Circuit Court upon this point was correct."

In the case of William Buskirk v. Day et al., 36 Ill., P. 260, the Court use language as follows: "Although it is the rule that all prior and contemporaneous conversations are merged in the contract resulting from it, yet such prior contemporaneous conversations are admissible and may be taken into consideration by the jury for the purpose of ascertaining whether the contract was procured through fraud or false representation." Under the pleadings in the present case the Court did not err in admitting parole evidence.

The appellant argues that the plaintiff's petition does not state a cause of action. After the appellant's motion to dismiss the suit was overruled by the Court, he filed an answer. The motion to strike now takes the form of the old demurrer and the law is well settled that where the party who desires to have an order overruling a demurrer (motion) reviewed he must stand by the demurrer and not plead over.--People v. Opera House Co., 249 Ill., 106.

The case was tried before the Court without a jury. He had an opportunity to see and hear the witnesses testify and is in a better condition to weigh the evidence than a Court of review. We have read the evidence as presented in the record and are of the opinion that the Court properly found the issues in favor of the plaintiff.

The appellant argues that the appellee was negligent in not going to the record to ascertain the amount of the mortgage on the premises, therefore, he should be barred from maintaining this action. We cannot see how the plaintiff could have ascertained the amount of the interest that was due on this mortgage by examining the records, as the interest payments would not be recorded.

The amount of the judgment rendered by the trial court was \$524.90, consisting of two items, viz., \$58.35 accrued interest on the \$6,000 mortgage and \$456.65 that was due on the \$13,645 mortgage on November 1, 1933. The appellant does not deny that the interest item of \$58.35 is correct, provided the plaintiff is entitled to recover at all. He denied that the \$468.75 is correct, and claims this item is for interest and principal on the \$13,645.00 loan, and that \$120.31 of the \$468.75 is for interest accrued after September 1, 1933. The Court found that the plaintiff had paid the sum of \$468.75 in order to reduce the indebtedness on the large mortgage to \$13,645.00 and also found that the parties had agreed that this mortgage should not exceed the sum of \$13,645. It is our opinion that any money that the plaintiff was compelled to pay to reduce this mortgage to the amount as represented in the contract was the proper amount of damages to be allowed.

In estimating the amount that was due the plaintiff from the defendant, the court including interest for the months of September and October, which amounts to \$120.31, and in this respect the judgment is erroneous. The clerk of this court is hereby authorized and directed to enter judgment in this court for the plaintiff, in the sum of \$404.59. The judgment as thus modified is hereby affirmed. The appellant and appellee each to pay their own costs in this appeal.

Affirmed as modified.

The applicant claims that the invention is

of value to the public inasmuch as the invention is a
novel, non-obvious, and useful improvement in the
art, and that the applicant is entitled to the patent
therefor. The applicant further claims that the invention
is a valuable addition to the art, and that the public
will be benefited by the use of the same.

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the public will be benefited by the use of the same.

In testimony whereof, the applicant has hereunto
set his hand and seal at the city of New York, this
first day of January, 1900.

Witness my hand and seal at the city of New York,
this first day of January, 1900.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

281 I.A. 612⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 6 - 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District
May Term, A. D. 1935.

| | | |
|--|---|-------------------|
| FLOYD M. GRIMES and ALICE V. GRIMES, |) | |
| Appellees, |) | |
| vs. |) | Appeal from |
| |) | Circuit Court |
| |) | Winnebago County. |
| ROCKFORD CREDIT SERVICE, INC., et al., |) | |
| Appellants.) |) | |

WOLFE -- P. J.

On October 11, 1932, in the Circuit Court of Winnebago County, the Rockford Credit Service, Inc., one of the appellants herein, obtained a judgment by confession against Henry L. Breinig and Geo. J. Breinig, in the sum of \$449.99: Henry L. Breinig is the same person referred to herein as H. L. Breinig. Execution thereon was issued by the Clerk of the Court on said date, and delivered to the sheriff of said County, on October 14, 1932, and was served upon the defendant, H. L. Breinig, on the same day. On October 14, 1932, H. L. Breinig was the owner of record of the title to: The West one-half of Lots 5, 6 and 7 in Block 7, of the Town of Winnebago, situated in the County of Winnebago, State of Illinois. On January 9, 1933, the sheriff filed in the recorder's office a certificate of levy on said property, under said judgment. On the same day the plaintiffs, Floyd M. Grimes and Alice V. Grimes, filed for record in the Recorder's office a warranty deed from the said H. L. Breinig, dated, signed and acknowledged on August 27, 1932, which conveyed to the said Floyd M. Grimes and Alice V. Grimes, husband and wife, a portion of the premises above described, that portion being: The South half of the West half of Lot 6, and the West half of Lot 7, in Block 7.

On October 3, 1934, the sheriff caused to be published a notice of sale of the premises first above described, which was duly published according to law and the sale had on the 24th of October, 1934. The premises were sold for \$400.00 to one C. A. Dodge, and the net amount after deducting costs was applied on the execution.

On October 13, 1934, prior to the holding of said sheriff's sale, the plaintiffs filed in the Circuit Court of said Winnebago County, their complaint in chancery, averring that said H. L. Breinig, a widower, was the owner of the said West one-half of Lots 5, 6 and 7, in Block 7; that he did on August 27, 1932, by his duly executed and acknowledged deed, convey to the plaintiffs the said South one-half of the West one-half of Lot 6 and the West one-half of Lot 7; that prior to said deed, the said Breinig had on May 31, 1932, entered into articles of agreement for a deed with one Martin H. Shaw and wife, for that portion of the said lots conveyed to the plaintiffs; that said Shaw and wife on said date of May 31, 1932, entered into possession of the premises and occupied the house located on the West one-half of Lot 7, and continuously occupied said house to the date of filing the bill of complaint; that the plaintiffs on the date of said deed on August 27, 1932, told said Shaw and wife, that the plaintiffs were the owners of said premises, subject to said contract for deed in possession of said Shaw, and told Shaw to make further payments on said contract to the plaintiffs; and that by virtue of such notice, the plaintiffs had been in actual possession of that portion of said lots deeded to them, since August 27, 1932.

Plaintiffs further aver that they filed their said deed of record on January 9, 1933; that the defendant, Rockford Credit Service, Inc., did on October 11, 1932, recover a judgment against said Henry L. Breinig and Geo. J. Breinig, which is recorded in Judgment Docket 36 at page 22, in the office of the clerk of the Circuit Court of Winnebago County, and on the same date caused an

On October 5, 1952, the Society received an announcement
a notice of sale of the premises listed above, which was
being published according to law and was also on the 10th of
October, 1952. The premises were sold for \$10,000.00 in cash.
The sale, and the net amount after deducting debts was turned over to
the Society.

On October 11, 1952, there was an auction of some property
and the proceeds thereon are now being used for the Society.
The property, which consisted of a house, a garage and a lot,
was sold for \$10,000.00. The house and garage were sold for \$7,000.00
and the lot for \$3,000.00. The proceeds of the sale were turned over to
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The house and garage were sold for \$7,000.00 and the lot for \$3,000.00.
The proceeds of the sale were turned over to the Society.

execution to be issued against said Breinig, which is recorded in Docket 0 at page 20, in the office of said clerk of Court, and did on January 9, 1933, cause a certificate of levy to be recorded by the sheriff, upon the said entire tract; that the sheriff did on October 2, 1934, make publication of a sheriff's sale of said property for October 24, 1934.

Plaintiffs further aver that said judgment having been entered of record prior to the filing by the plaintiffs of their said deed from Breinig, is a cloud upon the title of the plaintiffs; and they pray that said judgment against said Henry L. Breinig and the execution issued thereon, may be set aside and declared void so far as the same affects the said South one-half of the West one-half of Lot 6, and the West one-half of Lot 7; that the sheriff be enjoined from selling that part of said tract alleged to be in actual possession of said Floyd M. Grimes and wife; that if said sale be had before this cause comes on to be heard, said sale of said part of said tract be declared null and void and of no effect.

On October 25, 1932, the defendants filed a motion to dismiss the complaint, which motion was heard and overruled and defendants ruled to answer. Answer was filed November 1, 1934, denying the allegations of the complaint, and in defense averring that prior to the rendition of the judgment in question the defendant caused to be made a search of the records in the Recorder's office, and that the ownership of record of said entire tract was in said Breinig; that the alleged possession of part of said tract by said Shaw does not, in law, constitute notice to the defendants, of any claim of right, title or interest in said Grimes and wife; that any claim or interest in said Grimes and wife is subject to the lien of said judgment; that said sheriff's sale was of the entire tract, that the alleged claim of said Grimes and wife is to but part of this tract; that said Grimes and wife have never been in actual or constructive possession of said premises or any part, sufficient in law,

to put the said Rockford Credit Service, Ind., upon notice; that said Rockford Credit Service, Inc., is a bona fide judgment creditor of said Breinig, without notice of any claim or interest in said Grimes and wife, with full and perfect lawful right by said sheriff to sell said premises owned of record by said Breinig, to satisfy said execution.

No further pleadings were filed and the case was tried by the Court on December 26, 1934, and a decree entered sustaining the contentions of the plaintiffs.

There is no dispute concerning the facts in this case. The evidence shows that Martin Shaw and his wife entered into a contract of purchase of these premises from Daniel Falconer in May, 1932, and took possession of the same and remained in possession until after the suit in question. That subsequently Falconer sold the premises to Breinig and that the Shaws entered into a new contract of purchase on May 31, 1932. Neither of these contracts of purchase were recorded. On August 27, 1932, Breinig conveyed the premises to the Appellees. The deed was in regular form, properly executed, acknowledged, and delivered but was not recorded until January 9, 1933. After the Appellees had received their deed for the premises they notified the Shaws that they were the owners of the property and the Shaws attorned to them and paid them the monthly installments due upon the contract of purchase with Breinig.

On October 11, 1932, the Rockford Credit Service, Inc., obtained its judgment against Breinig. It is the contention of the appellant that by virtue of this judgment it secured a lien upon the property from that date. The appellee contends that if the appellant had made inquiry of the Shaws who were in possession of the property, they would have then been informed by the Shaws that the Shaws were in possession under their contract of purchase and that the appellees were the actual owners of the premises. This would be constructive notice to the appellant of the title of the appellee.

In the case of the German American Bank v. Martin 227 Ill.

629. It is stated as follows: "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led, and every unusual circumstance is a ground of suspicion and prescribed inquiry. Whatever is sufficient to put a party upon inquiry which would lead to the truth is in all respects equal to and must be regarded as notice. One having notice of such facts as would put a prudent man on inquiry is chargeable with the knowledge of other facts which he might have discovered on diligent inquiry. A purchaser may not excuse himself by merely obtaining information of the character in which the possession was originally obtained, but is bound to inquire of the person in possession by what tenure he holds possession and what interest he claims in the premises."

On October 11, 1932, at the time the appellant took its judgment against H. L. Breinig it had advanced and paid out no money or anything of value because this property was in the name of Breinig. Hence it had not been misled or damaged by the failure of the appellees to record their deed.

It is our opinion that the trial court properly found that the equities of the case are with the appellees. The decree entered by the Circuit Court of Winnebago County is hereby affirmed.

Affirmed.

In the case of the second mentioned case, the same law will

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

51A
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

281 I.A. 613¹

BE IT REMEMBERED, that afterwards, to-wit: On
1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District
May Term, A. D. 1935

ALAN M. HARDER,)
 Appellant,)

vs.))

Appeal from
Circuit Court,
Ogle County.

THE COUNTY OF OGLE IN THE STATE OF)
ILLINOIS, THE VILLAGES OF ADELINE,)
CRESTON, FORRESTON, LEAF RIVER,)
MT. MORRIS and STILLMAN VALLEY,)
all situated in said OGLE COUNTY,)
and the Cities of BYRON, OREGON,)
POLO and ROCHELLE, all situated in)
said OGLE COUNTY,)
 Appellees.)

WOLFE -- P. J.

The appellant Alan M. Harder, a resident of the City of Rockford, Illinois, is the owner of certain merchandise vending machines manufactured by the Mills Novelty Company of Chicago, Illinois. These machines are installed in various restaurants, confectionery stores and taverns in Ogle County, Illinois. They are operated by depositing a nickel in a slot provided therefor and pulling a lever. Each machine when operated releases a full size five cent package of candy mints for each nickel inserted. The mints are exposed in glass containers in front of and in full view of the operator. When the machine is operated there are three cylinders which revolve at different rates of speed, and on each of these cylinders are certain symbols and incomplete sentences. At the conclusion of each operation of the machine, however, these inscriptions, read together, form a complete sentence of a humorous vein. The machine sometimes delivers metal tokens in addition to the package of mints. According to the stipulation entered at the time of

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the hearing of the case all these tokens may be used for the purchase of merchandise. These metal tokens have no cash value and if inserted in the machine and the lever again pulled down, the machine operates as though a nickel had been inserted but no candy mints are released. The machine pays only in mints and tokens. The tokens are only redeemable in merchandise from the proprietor of the place of business where the machine is operated and not for cash.

At the January Term, 1934, of the Circuit Court of Ogle County, Illinois, Alan M. Harder appellant, filed a petition for a temporary injunction restraining the law enforcing bodies of Ogle County from seizing, confiscating, interfering with or preventing the use and operation of any machines of the type, character and operation described, and from arresting or causing to be arrested any person who kept, owned, operated or used any such machines in any of the locations in said county. A writ of injunction was ordered, restraining the defendants in accordance with the prayer of the petition, from arresting or molesting the operators of these different machines. The defendants filed a motion to dissolve the injunction, and on December 27, 1934 a hearing was had and the temporary injunction was dissolved. From the order dissolving the temporary injunction this appeal is taken.

An examination of the record, abstract and brief filed by the appellant discloses that in no place is there any statement of points or authorities relied upon for reversal, as provided for in rule 9 of this court. There is really nothing presented to this court for our decision, however, it seems to us that the machine in question is so clearly a gambling device that we will not dismiss the appeal. In the case of *Almy Manufacturing Company v. The City of Chicago* 202 Ill. Appellate 240, page 245 the Appellate Court of the first district in discussing a similar question quoting from 99 Me. 486 use this language: "This was a slot machine case, in its essence akin to the one at bar.

There, as here, the playing was a nickel, the return for the nickel being a nickel cigar with a chance of winning more cigars to the amount of fifty, and the court said: "In the case before us it is idle to assume, or concede, that the person putting his five cents into the machine may be doing so merely as a means or mode of buying a five cent cigar. It is idle to deny that the impelling motive is the hope of getting other cigars for nothing. If the machine did not afford that chance it would not be used. True, the cigar dealer sets up the machine to increase his trade and is recouped by that increase for any losses, so that in the end he loses nothing, but he does so by arousing and stimulating the gambling propensity, the very propensity the legislature evidently seeks to repress. The element of chance is the soul of the transaction. The operator hopes by chance to get something for nothing. The dealer hopes chance will save him from giving something for nothing. Each is pecuniarily interested adverse to the other in a result to be determined solely by chance. To use the language of the street, 'it is a gamble' which will win, and we have no doubt the transaction is 'gambling' in the statutory sense of the word." We are of the opinion that the trial court properly found this vending machine a gambling devise and properly dissolved the injunction. The judgment of the Circuit Court of Ogle County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

527
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

281 I.A. 613²

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 6 - 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT
MAY TERM, A. D. 1935.

| | | |
|----------------------|---|-------------------------------|
| ANNA MYERS, et al, |) | |
| |) | |
| Plaintiffs in Error, |) | |
| |) | |
| vs. |) | ERROR TO THE CIRCUIT COURT OF |
| |) | |
| JACOB OHM, et al, |) | KANKAKEE COUNTY. |
| |) | |
| Defendants in Error. |) | |

HUFFMAN-J.

This was a bill in equity brought by certain creditors of the Home State Bank of Grant Park, Grant Park, Illinois, seeking to enforce stockholders' liability against certain named persons alleged to be stockholders therein. The defendant in error herein, A. E. Price, denied that he was a stockholder in said bank. The court found all the defendants to be stockholders except the said Price, and as to him, the court found by its decree that he was not a stockholder and found no liability existing against him.

The decree herein was entered on December 17, 1932. Transcript of the proceedings was filed in this court on November 17, 1934, at which time a scire facias issued. Defendant in error filed his motion herein to quash the writ of scire facias and to dismiss this writ of error upon the grounds that with the expiration of the 31st day of December, 1933, plaintiffs in errors' right to sue out a writ of error herein expired. This motion was taken with the case. It is the opinion of the court that the decree of the trial court entered herein, being on a date prior to the taking effect of the present Practice Act, that the prosecution of this writ of error is governed

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by the former Practice Act of 1907, and the motion to quash the scire facias and dismiss this writ of error, is denied.

The above named bank received a permit to organize under date of May 25, 1926. It received its certificate to commence business July 6, 1926. It had a capital stock of \$25,000, consisting of 250 shares of the par value of \$100 each. Its place of business was located in the building formerly occupied by the Grant Park State Bank. It suspended business on January 10, 1928. This suit was brought by Anna Myers and others to enforce stockholders' liability. Among the persons alleged by the bill to be a stockholder, was the defendant in error, A. E. Price, who is alleged to be the owner of twenty-five shares of stock in said bank.

The evidence in this case is not conflicting. The testimony of Price and his son is to the effect that when the bank was being organized, Mr. Price agreed to take stock therein upon the agreement of the organizers that his son was to have a position in the bank when it was opened; and that before the bank started, Mr. Curtis and Mr. Griffin came to see the defendant in error and stated that they considered it imperative that they have some employee in the bank who could speak German, as it was a German community, and this being the case, it would necessitate leaving defendant in error's son "out", and that he would not become an employee of the bank. The defendant in error stated that under such conditions, he would not be willing to subscribe to any stock in the bank, whereupon he was advised by the parties present that they had presumed as much, and had already made different arrangements concerning the stock, and if he would come in the next day they would complete the transaction of releasing his stock. The evidence shows that pursuant to this conversation, defendant in error went to the room where the bank later began business, and there in the presence of various of the organizers, who later became stockholders and directors, he was instructed to sign his name on the back of a stock certificate after being first advised that

the said stock was going to be assigned over to Alice Cornell, Defendant in error denies the genuineness of his signature to the stub in the stock book attached to the certificate of stock to which he placed his name upon the back. There is nothing to indicate what became of the twenty-five shares of stock that the certificate which had been drawn to defendant in error represented. The bill of complaint alleges Alice Cornell to have been the owner of twenty-five shares of stock and the court so found by its decree, but there is nothing to show the manner in which she acquired same. There is no evidence disputing that of defendant in error and his son. The defendant in error never attended any bank meetings and was only present the one time, when he was advised to place his name upon the back of a stock certificate and told that the stock would be assigned to Alice Cornell. This followed the conversation of the previous day, wherein he was advised that his action in declining to subscribe to the stock had been anticipated and that other arrangements had been made for someone else to take the stock.

There is no claim that the defendant in error ever paid anything for any stock in this bank, and he swears he did not. There is no claim that any stock certificate was ever possessed by him, and he swears that none ever was. This bank could not have secured a certificate to commence business from the Auditor of the State of Illinois until the capital stock had been fully paid in, and due proof thereof furnished to such Auditor under oath, signed by each subscriber to the capital stock, and under the penalty that if such affidavit be fraudulent that the affiant should be deemed guilty of perjury; and after the furnishing of such proof, if the Auditor be satisfied that the authorized capital stock had been paid in and certain other conditions complied with, he would then issue a certificate, under seal, authorizing such bank to commence business. Sec. 5, Ch. 16a, Cahill's St. 1925. Defendant in error signed no such proof. It is apparent that somebody

other than the defendant in error subscribed to this twenty-five shares of stock, paid in the par value thereof, and signed the affidavit, before the certificate to commence business would have ^{been} issued by the Auditor of State. It is not incumbent upon defendant in error to show who subscribed to such stock. We are satisfied from the evidence that he did not. No liabilities to the complainants in the bill of complaint could have arisen prior to the date the bank commenced doing business, because the complainants were all depositors. The defendant in error not being a stockholder in said bank at any time after it commenced business, and no liabilities having accrued prior to the time of commencing business, therefore no liability on the part of complainants accrued against the defendant in error at any time he was stockholder.

The decree of the trial court was correct and is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

977
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice. 281 I.A. 613³

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 30 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1935.

THOMAS D. PARKIN and GRANT E.
CORDES,
(Plaintiffs) Appellants

vs.

Appeal from Circuit
Court, Woodford County.

SWENEY GASOLINE & OIL CO., a
corporation, and FRANK O. PIFER,
Sheriff of Woodford County,
Illinois,
(Defendants) Appellees.

WOLFE- P.J.

The appellants filed suit in the Circuit Court of Woodford County to quiet title to certain lands in said county and for other relief. The bill alleges that the appellant, Thomas D. Parkin, is the owner in fee simple and in possession of certain real estate, particularly described in the bill, in Woodford County; that the appellee, the Sweeney Gasoline & Oil Co., a corporation, on July 22, 1930 obtained a judgment by confession in the Circuit Court of Peoria County, Illinois, against appellants; that on August 19, 1930, a transcript of this judgment was filed in the office of the Circuit Clerk of Woodford County, and an execution was issued on the transcript by the Clerk of the Woodford County Circuit Court to the sheriff of that county. The bill further alleges that a levy was made on the real estate owned by the appellant, Thomas D. Parkin, by the Sheriff of Woodford County, by virtue of an alias execution issued out of the office of the Circuit Clerk of Woodford County, on July 25, 1933, and that the Sheriff had advertised the sale of the interest of the said Thomas D. Parkin and Grant E. Cordes in and to the real estate so levied upon. Said sale is to be held on August 25, 1933.

The bill further alleges that the judgment so entered by confession in the Circuit Court of Peoria County, Illinois, was entered without a warrant of attorney to confess judgment and was entered upon an insufficient purported power of attorney contained in a certain written contract, a copy of which contract was made a part of the bill and attached thereto; that the said purported power of attorney was invalid and of no force and effect; that the appellants nor either of them were indebted to the appellee in any sum, whatsoever; that the terms of the contract upon which the judgment by confession was entered was fully complied with by the appellants in every way and that there was no breach of said contract of any kind and that the judgment was therefore obtained by fraud.

The bill further alleges that the Circuit Court of Peoria County, Illinois, was without jurisdiction to enter the judgment by confession by virtue of anything contained in said contract and that the judgment was wholly void and of no force and effect; that the transcript of the judgment filed in Woodford County constituted a cloud upon the title to the land of the appellants and that if the sale advertised by the sheriff of Woodford County is carried out, it would further tend to cloud the title of the appellants.

The bill prayed that the judgment as aforesaid, may be declared a cloud upon the title of appellants in the real estate described in the bill, and that the same may be removed and cancelled of record as a cloud upon such title and that the Sweney Gasoline & Oil Company, a corporation, the appellee herein, and Frank O. Pifer, sheriff of Woodford County, Illinois, may be perpetually enjoined from collecting or attempting to collect the judgment, as aforesaid. Upon the presentation of the bill to the Circuit Court of Woodford County, an order was entered by the Court for an injunction. A writ of injunction was issued as prayed in the bill.

The defendant's filed what they termed a plea to the

jurisdiction of the court. This plea was filed on September 5, 1933 and after the formal heading, is as follows: "This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint mentioned to be true in such manner and form as the same are therein and thereby set forth, and for the sole and only purpose of filing this plea, and appearing for no other purpose, to plead thereunto, and for plea says:"

"That the prayer of the bill and the purpose of this suit is to stay the judgment at law and to perpetually and permanently restrain the said Sweeney Gasoline & Oil Company, a corporation, from proceeding to collect and enforce said judgment or any part thereof, which judgment was on the 22nd day of July, A. D. 1930 entered in the Circuit Court of Peoria County, Illinois against the complainants for the sum of \$600.00 in favor of this defendant and that the Statutes of the State of Illinois provide that such a suit for injunction shall be brought in the county where said judgment is taken, namely Peoria County, Illinois and that the venue of this action, if any action should be taken, and the subject matter of this litigation, should be in the Circuit Court of Peoria County, Illinois, rather than in the Circuit Court of Woodford County, Illinois and that this court has no jurisdiction whatsoever of either the parties or the subject matter of this suit or litigation."

"All of which matters and things this defendant avers to be true and pleads the same to the whole of said bill and demands the judgment of this Honorable Court whether it ought to be compelled to make any answer to said Bill and prays to be hence dismissed with its reasonable costs and charges in their behalf most wrongfully sustained."

A hearing was had upon the plea and an order entered Nov. 19, 1934, sustaining it and dismissing the plaintiff's bill for want of equity. From this order an appeal is perfected to this court.

...of the ... after the formal ... by ... matters and things in said bill of ... in such manner was found to be ... fourth, and for the ... for no other ...

... that the power of the ... in no way the ... from ... thereof, which ... extended in the ... the ... and that the ... out for ...

... all of which ... the ... the ... the ...

The plaintiff did not file a replication to the defendant's plea but had the same set down for hearing. The appellees contend that since there was no replication on file the plaintiff admits that the facts set forth in their plea are true and correct. They cite numerous authorities to sustain this contention. No doubt this is the usual rule. An examination of the plea discloses that there are no facts set forth which are not also stated in the bill of complaint. The only thing which the plea contains that is not stated in the bill is, that the court does not have jurisdiction to try the case because the judgment on the note was taken in Peoria County and this is a direct attack on the sufficiency of this judgment and can only be challenged in Peoria County where the judgment was taken. This is not a statement of a fact but is a conclusion of law of the pleader. The plaintiff, by having the plea set for a hearing, did admit all facts that are well pleaded in the plea, but did not admit the legal conclusions as set forth therein.

The appellees in their brief argue that the trial court may have heard evidence in support of their plea and that the abstract is not complete. In their printed arguments they say: "It is the duty of the appellants to bring before this court a complete record, and when they fail to bring up a complete record there can be no presumption of error and the presumptions are all in favor of the regular and correct action on the part of the lower court. This record is partial and incomplete and this court must assume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which is before them to sustain the separate rulings and decisions of the lower court." This Court will consider only the record as presented to us. Rule 8 of our court concerning abstracts, is in part as follows: "The abstract must be sufficient to present fully every error relied upon and will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions."

If the appellees had knowledge of facts which were not fully presented in the abstract and wishes this Court to take cognizance of

the same, they should file an additional abstract, and until that has been done, this Court will presume that the abstract does fully and accurately set forth all of the proceedings had before the trial court.

In the case of Hughes v. The First Acceptance Corporation, 260 Ill. App. 176, the facts are nearly identically the same as in this case. The court in that case held the main purpose of the bill was to prevent the sheriff's sale and conveyance thereby clouding the title of the lands owned by the appellee in Tazewell County and the court having taken jurisdiction of the case for one purpose would retain jurisdiction and do complete justice between the parties (Lester v. Stephens, 29 Ill. 155; Hayes v. O'Brien, 149 Ill., 403)

We are of the opinion that this is an original suit in chancery, and that the appellants had the right to bring the suit in Woodford County where the land is located. The judgment of the Circuit Court of Woodford County is hereby reversed and the case remanded to said Court, with direction that the court overrule the defendant's plea to the jurisdiction, of said court.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

281 I.A. 613⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 30 1935

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1935

Albert Samara,

Appellee,

vs.

Cliff Steward,

Appellant,

Appeal from the Circuit Court of
Henry County

WOLFE - P. J.

Albert Samara, the appellee brought suit in the Circuit Court of Henry County, against Cliff Steward, the appellant, to recover damages sustained by him in an automobile accident in which the car of the appellee collided with the truck of the defendant. The complaint alleges that the plaintiff while in the exercise of due care and caution for his own safety was driving his car on the hard road known as State Highway No. 28, south of Kewanee, Illinois; that the defendant, by his servant, was driving his automobile truck in a northerly direction, and that the defendant was negligent in the operation of his truck and negligently operated the same without sufficient light and negligently drove the truck at a high and dangerous rate of speed and on account of such carelessness and negligence the accident occurred.

The defendant filed an answer in which he denied that the plaintiff was in the exercise of due care and caution for his own safety while he was driving his automobile, and denied each and everyone of the allegations of negligence charged in the complaint. The case was tried before a jury. At the close of the plaintiff's case the defendant asked for a directed verdict in his favor, which was denied. At the close of all the evidence the motion was renewed and was again denied, and the jury found the issue in favor of the plaintiff and

In the Republic of Illinois

County of Cook

City of Chicago

Alfred J. Smith,

Appellee,

vs.

Cliff Stearns,

Appellant.

WITNESSES - P. 5.

Alfred J. Smith, the Appellee, brought suit in the Circuit Court of Henry County, against Cliff Stearns, the Appellant, to recover damages sustained by him in an automobile accident in which the car of the appellee collided with the truck of the appellant. The testimony shows that the accident while in the highway of the State and caused for his own safety was driving his car on the left road lane as State Highway No. 22, south of Chicago, Illinois, just the same, by the appellant, was driving his automobile in the northern direction, and that the appellant was traveling in the operation of his truck and negligently caused the same to enter sufficient light and negligently drove his truck in a line and caused the rate of speed and on account of such negligence and negligence the accident occurred.

The Appellant filed an answer in which he denied that the Plaintiff was in the exercise of due care and caution for his own safety while he was driving his automobile, and denied that he was negligent of the negligence of negligence shown in the testimony. The case was tried before a jury. At the close of the Plaintiff's case the defendant asked for a directed verdict in his favor, which was denied. At the close of all the evidence the court was requested to set aside the verdict and the jury found the case in favor of the Plaintiff and

assessed his damages at \$2600. Judgment was entered on this verdict and the defendant Stewart has appealed the case to this court.

The accident occurred on the State Highway No. 28 about one and a half miles south of the City of Kewanee. The plaintiff, in company with Mrs. Irene Burnett, who was riding with him in the front seat of the car, was proceeding in a southerly direction on said road, which is paved eighteen feet in width. The defendant's truck was being driven on the same road in a northerly direction by Ralph Peterson. The truck consisted of a Federal truck and Kingman trailer on which was a stock rack, which together was thirty-four feet eight inches in length. The trailer was approximately eight feet wide. There was a collision between the truck and the automobile. The plaintiff's witnesses testified that the accident occurred because of the defendant's agent and servant, Ralph Peterson was driving the truck over on the left side of the black line in the center of the road and that the trailer being wider than the rest of the truck collided with the car of the plaintiff and injured him. Peterson testified that he was driving the truck on the right side of the black line and that Samara drove his automobile into the side of the truck and that it was his negligence that caused the accident.

The points relied upon by the appellant for reversal are, that the verdict and judgment are contrary to the manifest weight of the evidence and that the court erred by excluding from the jury competent testimony on behalf of the defendant, especially in refusing to admit in evidence defendant's exhibits Nos. 2, 3 and 4.

In a case where the questions of negligence and contributory negligence are controverted questions, our courts have repeatedly held that it is the province of the jury to pass upon these questions, and unless the court of review can say that the verdict of the jury is manifestly against the weight of the evidence, their finding should not be disturbed. *King v. Meeker*, 269 Ill. App. 57; the Northern Trust

Company v. The Chicago Railroad Co., 318 Ill. App. 402. From an examination of the evidence in this case we cannot say that the verdict of the jury is manifestly against the weight of the evidence, but we are of the opinion that the evidence preponderates in favor of the plaintiff in that the accident was caused by the driver of the truck driving over the black line in the center of the road.

The appellant seriously contends that the trial court committed reversible error by refusing to admit in evidence appellant's Exhibits Nos. 2, 3 and 4, purported photographs of the truck which were taken the morning after the accident occurred. The court refused to admit these Exhibits in evidence because there had not been a proper foundation laid for their admission. These photographs were taken by a man, by the name of Ferdinand. The record shows that Mr. Ferdinand was present in court during the trial but was not called to identify the pictures in question. It is not contended by the appellee that in all cases it is necessary to call the photographer who took the photographs to identify it, before the photograph itself can be introduced in evidence, but it is the general rule that he should be called when he is available for such purpose. The appellant insists that the preliminary proof was sufficient to show that the truck was in identically the same condition at the time the photographs were taken as it was immediately after the accident, and that there had been no change in the condition of the injured parts of the cars. The preliminary proof of the accuracy of the photographs in representing the object which they are purported to represent rests largely in the discretion of the trial court. It seems to us that the evidence offered was sufficient to show that at the time the photographs in question were taken the truck was in the same condition as it was immediately after the accident. However, the man that took the photographs was present in court and was available as a witness, and no doubt would have given

and was available as a witness, and no doubt would have been
however, the fact that the photograph was taken at night
was in the condition as it was taken, and the witness
test at the time the photograph was taken was taken from
it seems to us that the evidence offered is sufficient to show
to represent fairly and largely in the opinion of the jury
photographs in connection with the case and that the evidence
parts of the time. The witnesses of the evidence of the
and that there has been no change in the condition of the injured
the photo room were taken as it was immediately after the accident
that the trial was in connection with the case of the
applicant testifies that the photograph was taken at night
he should be called when he is available for the purpose, and
self can be introduced in evidence, but it is the witness who
who took the photograph is available, and the photograph is
applicant that it is necessary to call the witness
identify the pictures in evidence. It is not contended by the
and was present in court during the trial but was not called
by a man, by the name of Johnson. The witness, John W. Smith,
foundation laid for their admission. These photographs were taken
admit these exhibits in evidence because there has been a proper
taken the morning after the accident occurred. The court refused to
of the Nos. 2, 3 and 4, purported photographs of the time when the
reversible error by refusing to admit in evidence applicant's
The applicant entirely contends that the trial court committed

valuable testimony in stating how, and from what angles the photographs were taken and the court, therefore, did not abuse his discretion in refusing to admit in evidence the defendant's Exhibits 2, 3 and 4.

Several witnesses testified to the damage done to appellant's truck and the jury had the benefit of this testimony and the exhibits 2, 3 and 4 would have been only supplemental to the oral evidence that had been given at the trial. A court will not reverse a case for the reason that supplemental evidence had been erroneously rejected. *Henke v. Deere, et al*, 175 Ill. App. 240; *C. & E. R. R. v. Grose*, 216 Ill. 602.

We find no reversible error in this case. The judgment of the Henry County Circuit Court is therefore affirmed.

Judgment affirmed.

valuable testimony in setting out, and from that point the case
was the only case and the only, therefore, the only case, the
evidence in relation to which is evidence in relation to the case.

3, 2 and 1.

Several witnesses testified to the same facts in relation to
truck and the fact that the result of this testimony was the same
2, 1 and 2 would have been only supplemented by the fact that the
had been given at the trial. The fact that the same facts were
the reason that a witness testified that his own testimony was
James v. Carey, 77 U.S. 110 (1869). The fact that the same facts were
the same facts.

It is not necessary to state in this case. The statement of the
jury would be the same as in the case of the jury.
The jury's verdict.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

952
AT A TERM OF THE APPELLATE COURT,

62 7
Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice. 281 I.A. 613⁵

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 30 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1935

MARGARET V. CORRIGAN, Executrix of
the last will and testament of Joseph
P. Corrigan, deceased, and individually,
Appellant

vs.

Appeal from Circuit
Court, LaSalle
County.

L. D. HEAD,

Appellee.

WOLFE -- P.J.

This is an appeal from the judgment of the Circuit Court of LaSalle County dismissing a petition for a citation to discover assets claimed to be in the possession of the appellee, belonging to the appellant as executrix of the last will and testament of Joseph P. Corrigan, deceased. Proceedings were commenced in the Probate Court of LaSalle County by a petition setting forth that the appellee had in his possession and under his control \$302.00 which was rental from real estate due Joseph P. Corrigan in his life time, and the same constituted a part of the assets of the Corrigan estate. The appellee filed an answer denying the allegation of the petition that he had any rental or sums of money in his possession which constituted a part of the assets of the Joseph Corrigan estate. A hearing was had in the Probate Court in which the petition was dismissed. An appeal was perfected to the Circuit Court of LaSalle County. The case was tried upon a stipulation of facts and the court again dismissed the petition. From that judgment an appeal is prosecuted to this court.

From the stipulation it appears that certain noteholders on

[illegible]

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1. Committee, composed of the following members:

— 34 —

CASE. 1. I.

collected

7.5 -- 11.5

October 6, 1930, entered into a contract under seal wherein they agreed that certain real estate should be conveyed to L. D. Head as trustee. He accepted the conveyance as trustee and entered upon his duties as such. The notes in question have a face value of \$19,000. There were nineteen notes, each for \$1,000. Joseph Corrigan held twelve of the notes; L. D. Head, three; Oscar Haerberle, three and Frank Hettel, one. The notes of Joseph P. Corrigan were pledged to The First National Bank of Ottawa, Illinois as collateral for a loan. The trust agreement by which L. D. Head held the title for this land in question, provided that such trustee should have possession of the land, rent it and divide the rent among the equitable owners.

That part of the contract that is in dispute in this litigation is as follows: "That L. D. Head shall sell and convey the said premises whenever during the life of this agreement he can obtain for the same the sum of \$175 an acre. * * * That the parties hereto shall have the right to modify and change this agreement at any time, whenever by the agreement of the owners of a majority in interests of the above described real estate, they shall desire to do so; and by such agreement they can require L. D. Head to convey said premises in accordance with the desires of the majority interests of said premises. * * * Whenever said premises shall be sold, L. D. Head, or the person holding the title under this agreement at the time of the sale, shall convey said premises and pay all necessary expenses of making the sale, and all taxes and shall distribute the balance remaining in his hands to the parties entitled hereunder in accordance to their respective rights and interests as stated herein."

The agreement was signed, L. D. Head collected the rents from the premises and accounted for the same to The First National Bank of Ottawa for the use of the interested parties. The parties, however, were unable to effect a sale at the price \$175 per acre. In the latter part of the year 1933 Joseph P. Corrigan stated to L.

D. Head that he, Corrigan, was a sick man and that the bank was pressing him for the payment of his indebtedness for which his notes were pledged as collateral, and that Corrigan desired L. D. Head to buy said real estate. L. D. Head refused to do so. In a subsequent conversation Corrigan said to him that he had a buyer at \$75 per acre for the land and wanted Head to sell at that price but Head refused to sign any papers at that price and stated that he would not sign a deed to said real estate at \$75 per acre until compelled to do so by an order of the court.

Later, Edward J. Cassidy, Vice President of The First National Bank at Ottawa, at the request of Mr. Corrigan, had a telephone conversation with Mr. Head in which he stated that Corrigan would release his interest in the rent corn on hand and give the same to Head if he would consent to the sale of the real estate at \$75 per acre. Corrigan's interest in this rent corn was 12/19ths of the full amount. A similar conversation took place shortly thereafter in Mr. Head's office between Joseph P. Corrigan and Head, and in this conversation Head told Corrigan that if he would give him his 12/19ths interest in the corn on hand he, Head, would consent to the sale of the land at \$75.00 per acre and sign the deed.

On December 16, 1933 Head agreed to convey said premises to one Kirby for \$6,200. This sale was completed on March 17, 1934. On March 23, 1934 Head sold the corn raised on said premises and delivered to The First National Bank of Ottawa, Illinois his check for \$3,729.12. This check was for 12/19ths of the net amount received from the sale of the real estate, but did not contain the 12/19ths received by Head for the sale of the corn which was on hand at the time the deed to the real estate was executed. The 12/19ths of this amount equaled \$302.16, and this sum is the amount in dispute in this litigation. Before the money was delivered to the bank Joseph P. Corrigan had died and Margaret B. Corrigan was appointed executrix of his last will and testament.

The complainant contends that in any and all dealings had

with Head, that Head was acting as trustee for the sale of the property and not representing his individual interest and therefore Head was bound to sell the property as provided in the trust agreement and that there was no consideration passed from Corrigan to Head to support any agreement that Head was to receive Corrigan's part of the corn in order to have him sign the deed. Also that the contract was under seal and could not be changed by parole evidence. Appellees concede that the general rule is that a contract under seal cannot be modified or changed by parole evidence, but they contend that the sale was not made under a contract under seal, but by a parole contract between Corrigan and Head acting as an individual, and that all of the interested parties having accepted their share of the sale price of the land in question, they are now bound by that agreement. The appellant in his printed argument states, "The other two parties in this matter, Oscar Haeberle and Frank Hettel were entirely passive in the course of the conversations between Joseph P. Corrigan and L. D. Head, and acceptance of the distribution made should be taken as a ratification of the sale at the price of \$6,200 for the 80 acres. In the same manner, L. D. Head, individual, and Joseph P. Corrigan expressed their satisfaction with such sale."

The agreement to sell the land for a lesser price, and for the appellee to have Joseph P. Corrigan's interest in the corn, both rest upon the same consideration. They constitute the whole agreement which has been ratified by all the parties to the original agreement. The appellant cannot receive and retain the benefits of the new agreement and insist upon its invalidity for the want of consideration to support it. It seems to us the stipulation clearly shows that when Corrigan was dealing with Head for the sale of this land, each was acting in his individual capacity, and that the original contract was supplemented by the later oral contract and the parties having accepted their proportionate share of the sales price under said contract, are now bound by the later contract.

The trial court did not err in dismissing appellant's petition. The order appealed from is hereby affirmed.

Affirmed.

The first part of the report is devoted to a description of the

method used for the investigation of the properties of the

material.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

63 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. FRANKLIN R. DOVE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

281 I.A. 614

BE IT REMEMBERED, that afterwards, to-wit: On AUG 11 1935
the opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1935

Henry Barton,

Appellee,

vs.

Appeal from the County Court

of Du Page County

C. M. Gauger,

Appellant,

HUFFMAN, J.

This was an action brought by appellee to recover damages sustained to his automobile, resulting from a collision of same with appellant's automobile. Appellee charged that the collision was the result of appellant's negligence in failing to stop his car before entering upon a state highway, upon which appellee was driving his car, in the City of Wheaton, which highway is designated as Roosevelt Road. This highway runs east and west, and is intersected at right angles by President street, which street runs north and south. Roosevelt Road is a state highway forty feet in width, with four traffic lanes, the two south lanes being for east bound traffic and the two north lanes being for west bound traffic. Each traffic lane is ten feet wide. At the southeast corner of the intersection of President street with the said state highway, is located a filling station. Appellant had stopped his car at this filling station in order to secure service. Appellee was approaching the point of intersection from the west and in the interlane for east bound traffic. Appellant drove his car out upon the intersection in the path of appellee's automobile, and the collision in question occurred. The right rear portion of appellee's car was damaged and the left front part of appellant's car was damaged. The case was heard by the court, without a jury. The court gave judgment in favor of appellee, for the sum of \$253.27 and costs. The appellant prosecutes this

In the presence of witnesses

Second District

New York, N. Y.

Henry B. ...

Applicant

vs.

U. S. ...

Applicant

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This was an action brought by

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appeal from the judgment as rendered.

Harry Proehl and his wife, Mildred Proehl, were in their automobile at the time and place of the accident, driving west on Roosevelt Road toward the intersection of said road with President street. These witnesses were familiar with this intersection. They testified that they saw appellant drive his car away from the filling station and upon the intersection where the accident occurred, without making any stop at the state highway upon which appellee was travelling. It is not in controversy that it was the duty of appellant to bring his car to a stop before entering upon said highway. James C. Cerney, a dental surgeon, was riding with appellee at the time of the accident. It appears from the evidence that they saw the appellant's car at the filling station and that as they approached the intersection, appellee sounded his horn, which appellant admitted he heard, and that appellant drove his car upon the said highway without making any stop or without reducing his speed, and undertook to make a U turn thereon; that appellee endeavored to avoid the collision by swerving his car to his left, but was unsuccessful in the attempt, whereupon the collision occurred as aforesaid, together with the resulting damages. Appellant and the filling station attendant testified regarding the accident to the effect that appellant brought his car to a stop before entering Roosevelt Road. Appellant also denies that he was attempting to make a U turn upon said highway. He claims the accident was due to appellee's negligence and not the result of his negligence.

The evidence in the case is not extensive, but upon the material facts is highly conflicting. With regard to the controlling elements of the case, the evidence is not susceptible of being reconciled and it was therefore necessary that the trial judge accept the proof offered upon behalf of one of the contending parties upon such questions, to the exclusion of that offered by the opposite party.

appeal from the judgment as rendered.

Early in the morning, when the sun was
shining at the rise and place of the accident, the first
halted toward the intersection of said road with Highway No. 1.
These witnesses were familiar with this intersection, and testified
that they saw appellant drive his car from the filling station
and upon the intersection of said road and Highway No. 1, appellant
any stop at the state street light when appellant was traveling.
It is not in controversy that he was the only car traveling on
his car to a stop before appellant drove his car. When it started
a local car, and when it started it was the only car on the road.
It is also not in controversy that when appellant drove his car
car at the filling station and that it was the only car on the
section, appellant sounded his horn, which appellant testified he
heard, and that appellant drove his car upon the road and was
out making any way to prevent appellant from driving.
to make a turn to the right; that appellant was driving to make a
collision by turning his car to the right, but he was prevented by
the car, which was the car which was the car which was the car
with the car which was the car which was the car which was the car
attendant testified that he was the only car on the road and
appealing drove his car to the left before appellant drove his
road. Appellant also testified that he was traveling to make a
turn upon said right. He stated the car which was the car which
negligence and not the result of his negligence.
The evidence in this case is not extensive, but upon the facts
there is highly conflicting. It is stated in the testimony that
of the case, the witness is not competent to make a statement
and it was therefore necessary that the case be decided by the
offered upon behalf of one of the parties to the case and
question, to the exclusion of that offered by the opposite party.

Where a case is tried by a court without a jury, its findings will not be disturbed unless they are clearly and manifestly contrary to the evidence. *Marble v. Marble*, 304 Ill. 229; *Sterling, etc., v. Gt. L. C. & C. C. Co.* 266 Ill. App. 46.

We have read the entire record in this case and we are satisfied therefrom that the evidence on behalf of appellee was sufficient to warrant the court in arriving at its judgment. The trial court had the advantage of seeing and hearing the witnesses testify. His opportunity of determining the disputed questions of fact, was superior to that of a court of review. The court in his remarks makes the statement that "he does not think one word of evidence escaped him; he endeavored to follow this case close, and give you the best judgment that the court knows how to give." A judgment under the foregoing circumstances, is entitled to all the favorable inferences that can be drawn therefrom, and if the evidence of the successful party, standing alone in the record, will support the judgment, courts of review are disposed to accept the same as decisive of the controversy.

Finding that the judgment of the trial court herein is supported by the facts as disclosed by the evidence, the judgment as rendered is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. FRANKLIN R. DOVE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

281 I.A. 614²

BE IT REMEMBERED, that afterwards, to-wit: On AUG 1 1935
the opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A.D. 1935

I. E. Wernicke,

Appellee,

vs.

John Link and Rose Mores,

Appellants,

Appeal from the Circuit Court

of Winnebago County

Huffman-J.

This suit arose out of the following circumstances: John Link and Tony Link brought replevin proceedings against their brother, Peter Link, to settle their respective rights concerning the possession of an automobile. The suit was brought before one Wendal Lewis, a Justice of the Peace.

Rose Mores was a sister of the parties to the above suit. She signed the bond in said proceedings together with her brothers John Link and Tony Link. The replevin suit was commenced on October 27, 1933. Since that time Tony Link has died.

Appellee was a constable at the time of the institution of the above suit and took possession of the car in question under the writ of replevin issued therein. It is maintained by appellee that under the instructions and directions of the appellants, he stored the automobile in a garage at the agreed price of twenty-five cents per day of twenty-four hours. The replevin case was carried to the county court where the issues were decided in favor of the defendant and a writ of retorno habendo was ordered.

During the interim the storage bill upon the car had accrued to the amount of \$62.25. Following the above judgment of the county court, appellee secured a judgment against appellants for the use of the garage owner for said sum of \$62.25 due for storage. This judgment

1. The first part of the report is a general statement of the purpose of the study and the objectives of the investigation.

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John the Baptist

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25, 1933. Since that time the work.

court where the same was held to be a fact of law.

• Describes what caused the accident to happen

the garage owner for sale and on 10.11.1947 for the garage.

was secured before Herbert H. Wilcox, a Justice of the Peace. From this judgment appellants took an appeal to the circuit court of Winnebago county, where the cause was heard by the court without a jury. The court gave judgment against appellants for \$62.25 and costs, from which judgment appellants prosecute this appeal.

The evidence in this case is not extensive but is highly conflicting. It is not susceptible of being reconciled, and it was therefore necessary that the trial judge accept the proof offered upon behalf of one of the contending parties and reject that offered ~~upon~~ by the opposite party. Where a case is tried by a court without a jury, its findings will not be disturbed unless they are clearly and manifestly contrary to the evidence. *Marble v. Marble*, 304 Ill. 229; *Sterling, etc. v. Gt. L. C. & C. Co.* 266 Ill. App. 46. We have read the entire record in this case, and we are satisfied that the evidence on behalf of appellee was sufficient to warrant the court in arriving at its judgment. The court had the advantage of seeing and hearing the witnesses testify, and his opportunity of determining the disputed questions of fact was superior to that of a court of review. In cases of this kind, it is necessary in order to arrive at a conclusion, that the evidence of one litigant must be accepted to the exclusion of that of the other litigant. The fact that the proof is conflicting, raises no inference that the judgment is not supported by the greater weight of the evidence. A judgment under the foregoing circumstances is entitled to all the favorable inferences that can be drawn therefrom, and if the evidence of the successful party, standing alone in the record, will support the judgment, courts of review are disposed to accept the same as decisive of the controversy.

Finding that the judgment of the trial court herein is supported by the facts as disclosed by the evidence, the judgment as rendered is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

201 T. A. 61 A 31

BE IT REMEMBERED, that afterwards, to-wit: on NOV 7 - 1935
supplemental
the/opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois
Second District
May Term, A. D. 1935.

City of Wheaton,

Appellee,

vs.

Appeal from the Circuit Court

Mary E. Oliver,

of Du Page County

Appellee,

Annie Graf,

Appellant.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING

DOVE, J.

It is earnestly insisted by counsel for appellant in his petition for a rehearing that our holding is contrary to the law as laid down in the case of Sherman State Bank v. Smith, 330 Ill. 373. This case was not cited or relied upon in appellant's original brief, but was first called to our attention in appellant's reply brief. We have examined this case and think it is clearly distinguishable from the instant case. In the Sherman State Bank case it appeared that Margaret Lane was the owner of certain real estate in Chicago and sold it to one John Smith and wife, and as part of the purchase price received from them a note for \$3500.00, which the purchasers had executed. This note was dated July 20, 1920, due five years after date and was payable to the order of the makers and by them endorsed in blank. It was secured by a trust deed upon the premises sold and the trust deed named Bruno F. Kowalewski as trustee and his brother Roman J. Kowalewski as successor in trust. Peter Nedvar became the owner of the equity of redemption and the Sherman State Bank claiming to own the note and trust deed and default having been made in the payment of the principal note which had become due, instituted foreclosure proceedings. Nedvar answered, admitting the amount due

In the Appellate Court of Illinois

Second District

May Term, 1911.

City of Madison,

Appellant,

vs.

Harry E. Oliver,

Appellee,

And the State,

Appellant.

WRIT OF HABEAS CORPUS FOR ADMISSION

DOVE, J.

It is earnestly insisted by counsel for appellant in his brief-

tion for a rehearing that our holding in *People v. Oliver*, 1911, 12, 13, 14

down in the case of *People v. Oliver*, 1911, 12, 13, 14, 15

case was not cited or relied upon in *People v. Oliver*, 1911, 12, 13, 14, 15

was first called to our attention in *People v. Oliver*, 1911, 12, 13, 14, 15

have examined this case and find it is clearly distinguishable from

the instant case. In the instant case we have no concern with

whether the State has the burden of proof or whether it is sufficient

to show it is one who has been and still is in the possession

price paid for from a note for \$2500.00, which was returned

and accepted. This note was dated July 22, 1911, and the first

date and was payable to the order of the State of Illinois

in plain. It was received by the State and upon the receipt of the

the first and second notes of \$2500.00 each, and the third

note of \$2500.00 was received in full. The first note was

given in the name of the State of Illinois and the second

to own the note and third note and the fourth note was made in the

payment of the principal note which was made in the name of the

closure proceedings. Never having, therefore, the money was

and a willingness to pay it, but averring that Mrs. Lane claimed to be the owner of the note and trust deed. Nedvar also filed a cross bill making Mrs. Lane a party thereto and by leave of court she also became a party to the original bill and filed a cross-bill. In her cross bill and in her answers to the original bill and to the cross bill of Nedvar, she alleged that the note and trust deed had been obtained from her by Bruno Kowalewski by fraud and that the Sherman State Bank acquired them with notice of her rights and was not a holder for value. Upon the hearing it was stipulated that prior to July 20, 1920 Bruno Kowalewski was the financial adviser of Mrs. Lane and caused himself to be named as trustee in the trust deed. Bruno Kowalewski and his brother as partners under the name of Sherman Park Safety Deposit Company maintained safety deposit boxes, one of which was rented to Mrs. Lane and in which she kept her valuable papers. Between April 24, 1924 and August 14, 1924 Bruno Kowalewski advanced to Mrs. Lane \$517.40, of which \$17.40 represented interest, and on the said August 14, 1924 he came to Mrs. Lane's home and obtained from her the note and trust deed, telling her it was necessary for him to have them in order to protect her interests and promising her that he would protect her rights and save her from the loss of any money. At this time and for some time previous, Kowalewski was president and director of the Sherman Park State Bank and the original complainant, Sherman State Bank, is successor in interest to the said Sherman Park State Bank, and it acquired the note and trust deed on August 15, 1924, paying \$3526.04 for them. On May 21, 1925 Mrs. Lane filed for record her affidavit, giving notice of her interest in the note and trust deed, and caused a like notice to be served upon Nedvar. In its opinion, the Supreme Court, in answer to the bank's contention that it was an innocent purchaser for value before maturity, stated that it was procured from its president who obtained the securities from Mrs. Lane by fraud and that

as between Mrs. Lane and Kowalewski the title never passed to him. That the bank had some knowledge that Mrs. Lane owned the Smith note as it was the custom of Mrs. Smith to take the interest coupons to the bank when they matured and Kowalewski, the president of the bank, would call the cashier and instruct him to pay Mrs. Lane her interest, the bank also had knowledge at the time it purchased the securities from Kowalewski that he was the trustee in the trust deed for the owner of the note and it purchased them from him the next day after he had secured possession of them by the commission of a crime. "The knowledge of the bank was sufficient", said the court, "to put it upon inquiry as to the title of its president from whom it purchased the papers. * * * It does not appear in this case that plaintiff in error (the bank) asked its president, Kowalewski, anything about the securities. It had notice that Mrs. Lane was, or claimed to be, the owner of the securities. It had notice that its president was the trustee in the deed to secure the note to the legal holder. It made no inquiry of its president, or anyone else, as to how he came to be in possession of the securities. The slightest inquiry of Mrs. Lane would have disclosed that he was a thief and had acquired the securities fraudulently. Under these facts and circumstances, we do not think it can be said plaintiff in error was an innocent holder for value. When Kowalewski acquired possession of the securities, he represented to Mrs. Lane that she was doing business with plaintiff in error (the bank). He obtained the papers from Mrs. Lane by a gross fraud on August 14, 1924. He was then president of plaintiff in error. He was also 'to some extent' the financial adviser of Mrs. Lane. On the next day after obtaining the papers from Mrs. Lane, he transferred them to plaintiff in error. January 1, 1925 he was ousted as president of the bank for previous misconduct in its management. * * * Under all the circumstances, we think it was the duty of the bank to make inquiry

as to Kowalewski's title before it purchased the papers and not having done so, it can not sustain its claim to being an innocent purchaser".

What the Supreme Court held in the Sherman State Bank case, supra, was that the bank was not an innocent purchaser of the note and trust deed which it had acquired from its president, Kowalewski, and the Appellate Court in the same case (Sherman State Bank v. Smith, 244 Ill. App. 171) also held that the bank was not an innocent purchaser for value without notice because Kowalewski, at the time he transferred the note and trust deed to the bank, was a stockholder therein and also director and president thereof, and that he acted for the bank in making the transfer and at the same time was trustee in the trust deed. The Appellate Court further held that even if the bank was an innocent holder, yet the bank made it possible for Kowalewski to perpetuate the fraud and therefore the loss occasioned thereby should be borne by it. Citing Mann v. Merchants Loan & Trust Co., 100 Ill. App. 224.

It is further insisted in the petition for a rehearing that the court should have found that appellee, Mary E. Oliver, was negligent in purchasing the bond in question without making any investigation whatever as to the title of the person from whom she purchased it. What was said in the Morrison case, cited and quoted from in the opinion, answers this contention. The bond in question here was payable to bearer and there is nothing upon its face which indicated that it was the property of anyone other than the holder. Such securities, as said in the Morrison case, have been passing from time to time as a regular business transaction and it is a common practice for such instruments to be traded in and sold in the open market, and inasmuch as Gair obtained this bond from Mrs. Graf by means of a confidence game, it is but reasonable to conclude that no inquiry that Grinnell Frank Oliver could have directed to him would have led to

as to Karamat's title before it reached the court and that
never found it, it can not sustain the claim to same in law.

That the Bureau Court held in the former case was
error, and that the bank was not an innocent purchaser of the same,
and that bank with it had acquired it from the deceased, Karamat,
and the appellee found in the law case a common law case.

With, 244 Ill. (1911) also held that the bank was not an

innocent purchaser for value of the same, and that the bank

at the time he purchased the same was not innocent of the same.

Accordingly the court held that the bank was not an innocent purchaser, and that

it was not for the bank to maintain an action for the same.

It is further held that the bank was not an innocent purchaser of the same.

For Karamat's title to the same was not sustained, and the bank was not an innocent purchaser of the same.

It is further held that the bank was not an innocent purchaser of the same.

With, 244 Ill. (1911) also held that the bank was not an

innocent purchaser for value of the same, and that the bank

at the time he purchased the same was not innocent of the same.

Accordingly the court held that the bank was not an innocent purchaser, and that

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innocent purchaser for value of the same, and that the bank

at the time he purchased the same was not innocent of the same.

Accordingly the court held that the bank was not an innocent purchaser, and that

it was not for the bank to maintain an action for the same.

It is further held that the bank was not an innocent purchaser of the same.

a disclosure by him of Mrs. Graf's interest in or title thereto. The instant case is clearly distinguishable from the Sherman State Bank case as there the bank, prior to its purchase of the note and trust deed had knowledge that Mrs. Lane claimed to own the securities purchased and it had notice that its president was named as the trustee in the trust deed, while in the instant case there is no evidence that either Mrs. Oliver or her son Grinnell Frank Oliver had any knowledge that appellant had or ever claimed to have any interest in the bond in question and we think that no inquiry which might have been made at the time of its purchase would have disclosed that appellee ever had title thereto.

The petition of appellant for a rehearing will be denied.

REHEARING DENIED.

a disclosure of him of the fact that he is a Jew. The
The important fact is clearly that the fact that he is a Jew
can not be taken into account, given to the fact that he is a Jew
trust deed and knowledge that fact. It is stated to be the fact
the fact that he is a Jew and that the fact that he is a Jew
the fact that he is a Jew, while in the fact that he is a Jew
no evidence that he is a Jew. It is stated to be the fact that
has any knowledge that he is a Jew and that he is a Jew
interest in the fact that he is a Jew and that he is a Jew
might have been made at the time of the fact that he is a Jew
closed that applies even to the fact that he is a Jew.
The position of the fact that he is a Jew is stated.

THE FACT THAT HE IS A JEW

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of May, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. FRANKLIN R. DOVE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

281 I.A. 614³

BE IT REMEMBERED, that afterwards, to-wit: On SEP 18 1935
the opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1935.

| | | |
|------------------|---|-------------------------|
| City of Wheaton, |) | |
| |) | |
| Appellee |) | Appeal from the Circuit |
| |) | |
| vs. |) | Court of DuPage County. |
| |) | |
| Mary E. Oliver, |) | |
| |) | |
| Appellee |) | |
| |) | |
| Annie Graf, |) | |
| |) | |
| Appellant |) | |

DOVE, J.

On April 20, 1925, the City of Wheaton, by its Mayor, Treasurer and City Clerk, issued the following instrument, viz:

"Bond No. 863, Series No. 9, \$1,000.00 improvement bond of the City of Wheaton, County of DuPage, State of Illinois, authorized by Act of Legislature approved June 14, 1897 and all amendments thereto.

The City of Wheaton in DuPage County, Illinois, for value received, promises to pay to bearer, on the 15th day of July, A. D. 1934 the sum of \$1000.00 with interest thereon from date hereof at the rate of six per cent per annum, payable annually on presentation of the coupons hereto annexed. Both principal and interest of this bond are payable in the office of the Treasurer of said City of Wheaton in DuPage County, Illinois. This bond is issued to anticipate the collection of a part of the tenth installment of Special Assessment No. 180 levied for the purpose of paving Washington, Indiana and Evergreen Streets in the City of Wheaton, which said installment bears interest from the 10th day of November, A. D. 1924 and this bond and the interest thereon are payable solely out of said installment when collected."

Annual interest coupons for \$60.00 were attached thereto, coupon No. 9 being due July 15, 1933 and coupon No. 10 being due on July 15, 1934.

On September 10, 1934 the City of Wheaton filed its complaint in the nature of an interpleader, alleging the issuance of said bond and averring that it had on hand \$300.00 principal and \$15.00 interest applicable to the payment of said bond and coupons; that

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Mary E. Oliver had presented the said bond and coupons to the City for payment and Michael Graf had also asserted ownership of said bond and notified the plaintiff to make payment to him and not to any other person. The prayer of the complaint was that the court would determine the true ownership of the bond and direct the payment of the sums applicable to the payment thereof to the person entitled thereto. Mary E. Oliver and Michael Graf filed their respective answers, each claiming to be the owner of said bond. Thereafter a hearing was had and the Court found that Michael Graf had or claimed to have no right to the property but upon motion Annie Graf, the wife of Michael Graf, was given leave to become a party defendant and file her answer. In her answer she alleged that several years prior to 1933 she had purchased the bond and coupons in question from the city, that during the first part of the year 1933, one Ralph Bennett came to her home and represented to her husband and herself that he desired to buy two lots which she and her husband then owned, one in Hammond, Indiana and the other in South Chicago, Illinois. That he, Bennett, further represented that there were liens and encumbrances upon said lots amounting to \$240.00 and stated that if this defendant and her husband would give him the bond in question, that he would pay said sum of \$240.00 and thereby clear the title to said lots of said liens and encumbrances. It was then alleged that the defendant gave to the said Bennett the bond and coupons mentioned in the complaint, and averred that if Mary E. Oliver at any time obtained possession of said bond and coupons, she obtained possession thereof by reason of the unlawful conduct of Bennett, that she did not pay a valid consideration therefor, is not the lawful holder thereof, inasmuch as she had notice of the defect in Bennett's title and her action in taking said instrument amounted to bad faith upon her part.

A further hearing was then had which resulted in a decree finding that Mary E. Oliver was the owner of the bond and coupons thereto attached and directed the City of Wheaton to pay the said Mary E. Oliver all monies due and payable on said bond and coupons.

It is from this decree that Annie Graf has prosecuted this appeal.

It was stipulated that the instrument in question formerly belonged to appellant and was obtained from her by Ralph Bennett and R. A. Gair by means of a confidence game and the evidence discloses that thereafter and on July 25, 1933, a member of a brokerage firm with whom Grinnell Frank Oliver, the son of appellee Mary Oliver, had previously done some business, called him over the phone at his office at No. 1 North LaSalle Street in Chicago and inquired of him whether he was interested in the purchase of a Wheaton special assessment bond. Shortly thereafter a gentleman giving his name as Gair called Oliver on the phone, stating that he had been referred to Oliver by a member of said brokerage firm and inquired if he was interested in the purchase of a Wheaton special assessment bond. He gave Oliver the number of the special assessment and in reply to Oliver's inquiry, told him that the bond had been in default for a couple of years. Oliver then told him that if he would call him later in the afternoon, he would then tell him whether he would purchase the bond and what he would give for it. After that conversation Oliver made inquiry of the City Attorney of Wheaton and others and learned that the interest on this bond was in default. Oliver then got in communication with an officer of the Gary-Wheaton bank and inquired of him whether he was interested in the purchase of this bond and was advised that the bank was not interested. Subsequently Oliver took the matter up with his mother and later, the same day, advised Mr. Gair, over the phone, that he would bid thirty-five for the bond. In the evening he told his mother of the purchase and the next morning his mother went to the First National Bank in Chicago, where she withdrew from her account \$350.00 and gave this amount to her son and he took it to his office. About 11:00 o'clock that morning Mr. Gair came to the office and the transaction was completed by Oliver delivering to Gair the \$350.00 and receiving from Mr. Gair the bond in question. Appellee, Mary E. Oliver, testified that she was not acquainted with Annie Graf or Ralph Bennett or R. A. Gair and had never heard of any of them, and Grinnell Frank Oliver, her son, testified that he had no previous dealings or

It is from this source that the following information was obtained.
It was stated that the information was obtained from the following sources:
U. A. City by means of a confidential source and the following information
that was obtained on July 20, 1967, a letter of a confidential source
with whom previously from Oliver, the son of the son of the son of Oliver
previously from some business, called the son of the son of Oliver
at No. 1 North Main Street in Chicago and informed of the following:
he was interested in the purchase of a house situated at 1000 North
Shortly thereafter a confidential source called him and told him that
on the phone, stating that he had been advised to call him at 1000
of said business and was advised to be very careful in the way
of a house situated at 1000 North Main Street. The son of the son of Oliver
of the business and was advised to be very careful in the way
that the house was situated at 1000 North Main Street. Oliver then
told him that it was a house and was situated at 1000 North Main Street.
Then told him whether he would purchase the house and was advised
give for it. After this conversation the son of the son of Oliver
attorney of the son of the son of Oliver and was advised to be very
that was in Chicago. Oliver then told him that he was interested
of the son of the son of Oliver and was advised to be very careful
in the purchase of this house and was advised to be very careful
interested. Consequently Oliver then told him that he was
and later, the son of the son of Oliver, was advised to be very
would be interested in the house. The son of the son of Oliver
of the purchase and the son of the son of Oliver was advised to be
National Bank in Chicago, where the son of the son of Oliver was
and gave this amount to him and was advised to be very careful
11:00 o'clock that morning at 11:00 o'clock that morning the son of
action was completed by Oliver and was advised to be very careful
calling that the son of the son of Oliver was advised to be very
testified that the son of the son of Oliver was advised to be very
Fennell or U. A. City and was advised to be very careful in the way
Frank Oliver, son of the son of Oliver, testified that he was interested in

acquaintance with R. A. Gair and the first conversation he had ever had with him was the conversation over the phone the day before the bond was delivered and the only time he had ever seen him was upon the following morning when Gair called at Oliver's office and delivered to him the bond in question and received from him \$350.00 therefor.

Hart v. Board of Education, 278 Ill. App. 132 was an action instituted to recover an amount represented by certain anticipation warrants issued by the Board of Education of Chicago. The declaration alleged, among other things, that the plaintiff was the owner of these anticipation warrants aggregating \$13,450.00, which had been issued by the Board of Education of Chicago and which were payable out of the taxes levied for school building purposes for the year 1931; that on April 11, 1932, the plaintiff intrusted to one Terry these warrants for the purpose of depositing them for safekeeping in the Merchants Bank and Trust Company: that Terry so deposited them, receiving in return therefor a safekeeping receipt made out to him, Terry: that Terry delivered the receipt to the plaintiff, but thereafter, with intent to defraud the plaintiff, executed an affidavit representing that he had lost the receipt and thereupon received from the bank said warrants. It was further alleged that the plaintiff had notified defendant of the loss of its warrants, but that defendant, regardless of its duty not to pay to anyone other than the plaintiff, had paid out moneys to other persons on some of the warrants so belonging to the plaintiff. A demurrer was sustained to this declaration and in affirming the judgment of the trial court the Appellate Court cited the case of Morrison v. Austin State Bank, 213 Ill. 472, which held that municipal warrants, though negotiable in form, were non-negotiable in fact and hence were not within the protection of the rule which guards commercial paper. In its opinion the Appellate Court said that it was not thoroughly in accord with the rule laid down in the Morrison case, but were, nevertheless, constrained to follow it. The court then held that the failure of the plaintiff, upon the return to it of the receipt showing that Terry had deposited

agreed with J. A. Dett and the first corporation as the same
had also been the corporation since the time the day before the
port was delivered and the only time he had been the only one
the following morning when Dett called at 11:00 a.m. and the
livered to him the bank in question and received the same
thereafter.

That J. A. Dett of Chicago, Ill. has no action in
relation to recover on claims represented by certain corporations
various issued by the Board of Directors of Chicago. The claims
tion alleged, among other things, that the Dett and his wife
of these corporations were as a result of 11,400,000, which was
been issued by the Board of Directors of Chicago and which was
the one of the same listed in report filed in Chicago for the year
1931; that on April 11, 1932, the Dett and his wife
these corporations for the purpose of depositing them for withdrawal
the American Bank and Trust Company; that Dett and his wife
respective to return therefor a checkbook and other items of value,
Terry: that Terry delivered the money to the Dett and his wife
after, with intent to defraud the corporation, deposited the money
representing that he had paid the money and the corporation received the
two bank and currency. It was further alleged that the Dett
had notified defendant of the loss of the money, but that defendant,
regardless of the fact that he was to receive the money from the Dett,
had paid out money to other persons in order to get the money on which
the is the Dett. A demand was presented to this corporation
and in settling the amount of the Dett and his wife's claim
also the case of Dett and his wife, 11,400,000, which
said that certain warrants, known as "warrants of 1931", were
relative to fact and money were not paid to the corporation and
role with certain corporate assets. In the case of the corporation
Court said that it was not necessary to account with the Dett and
down in the United States, but some, nevertheless, according to
follow it. The court then held that the Dett and his wife
upon the return to it of the money, which the Dett had furnished

the warrants in his own name, to notify the bank that it was the owner of the warrants and to have required a receipt in its own name made it possible for Terry to later obtain possession of the warrants and afterwards dispose of them to innocent purchasers, and in the course of its opinion said: "The warrants involved in this proceeding were payable to bearer and there was nothing upon their face which indicated that they were the property of any one other than the holder. These instruments have been passing from time to time as a regular business transaction, particularly in later days when municipalities have been compelled to anticipate their tax collections. If Terry had sold the warrants after they came into his possession and before he deposited them with the bank, we believe there would be no question but that an innocent person would be protected. In view of the fact that, upon obtaining a receipt from the bank, the plaintiff was able to ascertain that it was in the name of Terry and took no steps to correct it, leaving an opportunity for the fraud which was committed, the fault was that of the plaintiff. * * * In view of the common practice of the barter and sale of these warrants in the open market in this community, we believe that the plaintiff failed to take such steps as were necessary to protect its interest and should be estopped from making a claim against the defendant which would be superior to that of an innocent purchaser of these warrants for value. Under the circumstances, the defendant, Board of Education of the City of Chicago, and the treasurer of the City would have no right to refuse payment of these warrants when presented."

In Northern Trust Co. v. Village of Wilmette, 220 Ill. 417, relied upon by appellant, it was held that village improvement bonds which had been issued by the municipality to a contractor in payment for a public improvement and which were subsequently assigned to the plaintiffs were not negotiable and the plaintiffs as holders thereof had no greater rights than the contractor to whom they were issued. The bond involved herein is similar to those issued by the Village of Wilmette in the Northern Trust Co. case supra, and therefore it must be held that such bond does not possess all of the qualities of negotiable paper. The

the response to his own work, in which he has been the
owner of the response as to the response in the work
made it possible for him to be a response in the work
and therefore to be a response in the work, and in the work
of its own work, and in the work, and in the work
possible to be a response in the work, and in the work
that they have the response in the work, and in the work
instruments have been possible in the work, and in the work
transmission, and in the work, and in the work, and in the work
compelled to be a response in the work, and in the work
written after they have the response in the work, and in the work
then with the work, and in the work, and in the work, and in the work
thenceforth, and in the work, and in the work, and in the work
obtaining a response in the work, and in the work, and in the work
that is the work, and in the work, and in the work, and in the work
and in the work, and in the work, and in the work, and in the work
rest of the work, and in the work, and in the work, and in the work
better and more of the work, and in the work, and in the work, and in the work
we believe that the response in the work, and in the work, and in the work
help to be a response in the work, and in the work, and in the work, and in the work
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herein is a work, and in the work, and in the work, and in the work, and in the work
Northern Trust Co., and in the work, and in the work, and in the work, and in the work
head does not respond to the work, and in the work, and in the work, and in the work, and in the work

same question, however, that arose in the Village of Wilmette case, supra, does not arise in the instant case as the question of defenses that might be raised by the City of Wheaton against a contractor to whom this bond had been previously issued does not arise. Another case cited and relied upon by appellee is Drouineau v. First National Bank of Marion, 224 Ill. App. 251. In that case plaintiff's husband stole from her three special assessment bonds, payable to bearer and pledged them to the defendant bank as collateral for a loan. The bank was held liable to the plaintiff, the owner of the bonds, the court stating that the bonds involved were not negotiable instruments and that^{it} was familiar law that one in possession of chattels, other than coin, bank bills and negotiable instruments, by theft can convey no title to an innocent purchaser. In the Drouineau case, supra, the bank came into possession of the bonds by the hands of one who had stolen them. In the instant case appellee voluntarily parted with possession of the bond in question and intended that Bennett should have it. While it is true that she did so because of Bennett's false statements, yet it was her voluntary act which deprived her of the custody of the bond and clothed him with both its possession and title. It was therefore her negligence which put the bond in circulation, and as appellee acquired it for value, without notice and before maturity, the rule applies that where one of two innocent parties must suffer loss by reason of the wrongful acts of another, the one who put it in the power of the wrongdoer to commit the wrong must sustain the loss. Connor v. Wahl, 330 Ill. 136.

The decree of the lower court is affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

45-
76
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

221 I.A. 614⁴

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1935
the opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1935.

| | | |
|-------------------|---|----------------------------|
| CHARLES MONTAGUE, |) | |
| |) | |
| Appellee, |) | APPEAL FROM THE CIRCUIT |
| |) | |
| vs. |) | COURT OF WINNEBAGO COUNTY. |
| |) | |
| R. S. LARSON, |) | |
| |) | |
| Appellant. |) | |

DOVE, J.

This is a suit to recover damages for personal injuries sustained by the plaintiff as the result of an accident which occurred on the evening of September 23, 1933 at the intersection of Rockton Avenue and West Jefferson Street in Rockford, Illinois. Rockton Avenue runs north and south and Jefferson Street east and west. There were traffic lights at each corner of the intersection which were operating at the time of the accident and which at that time gave the traffic on Rockton Avenue the right of way. The defendant was driving an automobile north on Rockton Avenue and the plaintiff was a pedestrian and had proceeded along Jefferson Street and entered the south side of the intersection into Rockton Avenue on a line with the south side of Jefferson Street if that walk had been extended easterly across Rockton Avenue. It is the contention

of the plaintiff that when he reached about half-way across the street, he observed the defendant's car approaching and stopped, expecting the car to go around him, that the left front bumper of the defendant's car struck him, knocking him to the pavement and as a result thereof he was rendered unconscious and his leg was fractured and he suffered a permanent shortening of that leg. It was the defendant's contention in the court below and is his contention here that the plaintiff stepped directly in front of the defendant's car when the car was only a few feet distant from the plaintiff and that plaintiff's injuries were not due to any negligence on the part of the defendant. Both the plaintiff and the defendant testified and they were the only occurrence witnesses. There were no other cars on Rockton Avenue at and just prior to the time of the accident and the plaintiff was the only pedestrian upon the crossing. The head lights on the defendant's car were burning and the street light was also burning at the intersection, the accident occurring about 7:30 o'clock in the evening. The jury returned a verdict for \$4,000.00 in favor of the plaintiff upon which judgment was rendered and the record is brought to this court for review by appeal.

It is insisted by appellant that the trial court erred in permitting Dr. Ives, the attending physician and surgeon, to testify that the injuries of the plaintiff were permanent and that the court also erred in its instructions.

The court instructed the jury in narrative form as provided by the Civil Practice Act. As to the measure of damages the jury were told: "If you find the defendant guilty you will be required to assess the plaintiff's damages and in assessing his damages, if any, for personal injuries, it is not necessary that any one testify

to any amount in dollars and cents but the jury may themselves determine the extent of personal injuries, so far as the same is shown by the evidence and may apply their judgment and experience thereto and determine the amount in dollars and cents, from all the evidence pertaining to damages and in that event, allow such sum as in the judgment of the jury will be a fair compensation to plaintiff for such damages so proven, if any, and in case you find the defendant guilty, then in assessing plaintiff's damages, the jury may assess in favor of plaintiff and against defendant, such sum or sums of money as shown by a preponderance of the evidence that plaintiff has paid or become liable to pay in endeavoring to be healed and cured of his injuries so received, at the time of said accident, together with such sum for personal injuries covered by these instructions and such sum as the jury may believe from the evidence, would be fair and just compensation for any pain and suffering undergone by plaintiff in consequence of said injuries, and such sum as you may find from a preponderance of the evidence would be fair compensation for any permanent injuries sustained by plaintiff on account of said injury".

Counsel for appellant insist that by this instruction the court told the jury that appellee was entitled to recover for mental anguish, chagrin, humiliation and embarrassment that he might suffer because of bodily defects resulting from the accident such as the shortening of his leg; that the instruction does not limit the money appellee paid or has become liable to pay in endeavoring to be cured to the necessary expenses reasonably incurred by appellee and that the instruction did not require appellee to prove each particular item of damages by a preponderance of the evidence.

Appellant concedes that there are three elements of damages for which appellee would be entitled to recover compensation, viz: first, money necessarily expended or for which he had become liable; second, physical pain and mental suffering naturally and directly resulting from the injury and third, any permanent physical injury. We agree with counsel that this instruction is cumbersome, contains some repetition and is not as clear, concise or as easily understood as it should be. We fail to find anything therein, however, that would have warranted the jury in including therein as a part of appellee's damages his mental anguish, chagrin, humiliation or embarrassment not a direct result of his physical pain, but which may have been caused appellee by his shortened leg. As to the criticism that the instruction did not limit appellee's recovery to the necessary expenses reasonably incurred by appellee, the record discloses that upon notice and before trial, the expenses, for which appellee sought a recovery, including physician, surgeon and hospital bills, were agreed upon and read to the jury upon the trial without objection. There is no merit either in appellant's contention that the instruction did not require appellee to prove each specific item of damage by a preponderance of the evidence. The instruction begins by telling the jury in effect that before they would be required to assess any damages they must find the defendant guilty and then after it had proceeded for some length and before enumerating the several elements, the instruction says: "and in case you find the defendant guilty, then in assessing plaintiff's damages, the jury may assess in favor of plaintiff and against defendant, such sum or sums of money as shown by a preponderance of the evidence" etc. We do not approve of this instruction, but would hesitate to reverse the judgment solely on account of this portion of the court's charge to the jury.

In another paragraph of the court's instructions, the jury were told: "there is nothing shown by the evidence which required the plaintiff or defendant to use extraordinary care. Each of the parties to this suit was required to exercise ordinary care for his own safety and to prevent injury to any other person lawfully using said street, and, if, you believe from the greater weight or preponderance of the evidence that the plaintiff, at and immediately prior to the time of the accident, acted as an ordinarily prudent person would ordinarily have acted, under the same or similar circumstances, and if you further believe from a preponderance or greater weight of the evidence that the defendant was guilty of negligence in the operation of his automobile, which caused or contributed to cause the injuries to plaintiff, then the jury should find defendant guilty". By the latter portion of this instruction the jury were told that if they believed from the evidence that the defendant was guilty of negligence in the operation of his automobile which contributed to cause the injuries to the plaintiff, then the jury should find the defendant guilty. The phrase "or contributed to cause" had no place in this instruction as the evidence discloses that the only one who could, in any way, have contributed to this accident was either appellee or appellant. This paragraph, however, told the jury that if they believed from a preponderance of the evidence that the plaintiff was in the exercise of due care at and immediately prior to the accident, and if they further believed that the defendant was guilty of negligence which contributed to cause the injuries to the plaintiff, then the jury should find defendant guilty. Before the jury would have been warranted in finding the defendant guilty under this paragraph, they must first have found that the plaintiff was in the exercise of due care, that is,

that he must have been free from any negligence and therefore the construction which counsel for defendant urges to the effect that this instruction meant that the jury would have been warranted in finding the defendant guilty, even though they believed that the plaintiff was guilty of negligence, if the jury also believed that the defendant's negligence contributed to cause the injuries to the plaintiff, is unwarranted. Furthermore, in other paragraphs of the instructions, the jury were told: "Before the plaintiff can recover at all in this case against defendant, he must prove by a preponderance or greater weight of the evidence each of the following propositions: First, that the plaintiff was in the exercise of ordinary care for his own safety at and just prior to the time of the accident in question; Second, that the defendant was guilty of negligence in the manner charged, and Third, that such negligence of the defendant, was the approximate cause of the injury to the plaintiff, and if you find from the evidence that plaintiff has failed so to prove these propositions, as stated, or that he has failed so to prove any one of them, he cannot recover against the defendant, in which case you should find defendant not guilty". We believe the objectionable phrase should have been omitted, but we are not inclined to reverse this judgment when we consider the instruction in its entirety.

It is further insisted by appellant that the trial court, in its instructions, unduly pointed out to the jury what appellee claimed to be the facts in the case and failed to point out to the jury what appellant claimed the facts to be as shown by the evidence. The paragraph of the instructions referred to is as follows, viz: "In this case plaintiff charges that on September 23, 1933, defendant owned and was driving an automobile northerly on Rockton Ave.: that

plaintiff was crossing Rockton Ave. from west to east on the sidewalk line of the intersection of Rockton Ave. and West Jefferson St.; that plaintiff was in the exercise of reasonable care for his own safety; that the defendant carelessly, negligently and improperly drove, managed and operated said motor vehicle so that by and through such carelessness, negligence and mismanagement of said automobile by said defendant, the motor vehicle of the defendant struck plaintiff, severely injuring plaintiff; that defendant improperly failed to keep a proper lookout ahead; that it was the duty of defendant to operate his automobile at a speed so as not to endanger the life and limb of any person and that defendant failed to so operate his automobile at the time and prior to the accident in such a manner. This is denied by the defendant". Counsel for appellant say that he not only denied that he was negligent but claimed that appellee stepped in front of his automobile when appellant was a very short distance from appellee and at a time when he was unable to avoid striking him. It is true that appellant had the right to have the jury instructed upon his theory of the case if it had a basis in the evidence upon which to rest. Chicago Union Traction Co. v. Browdy, 206 Ill. 615. The record, however, in the instant case discloses that the parties hereto, in accordance with the Civil Practice Act, submitted to the court suggestions as to what the court's instruction should contain. Counsel for appellant submitted to the court no such suggestion such as they now insist upon. Furthermore, prior to reading the instructions to the jury, the court read to counsel out of the presence of the jury the charge the court proposed to give and counsel made no objection thereto at that time and while the court granted counsel ten days in which to file objections to any part of its charge, we believe, in fairness

to the trial court, counsel for appellant should have suggested the inclusion of such matter which they now insist it was error to omit. All that this paragraph of the instruction does is to recite the charges made by plaintiff as stated in the complaint and which the evidence tends to substantiate. The answer of the defendant consisted of ten lines in which he denied paragraphs one and three of the complaint and denied paragraphs one and two of the second and third counts of the complaint. It perhaps would have been better if the trial court had stated a little more fully the claim which appellant made to meet the charges of appellee, but we are of the opinion that upon this record appellant should not now be heard to complain.

It is finally insisted that the court erred in permitting Doctor Ives to testify as to the permanency of appellee's injuries. The record discloses that Doctor Ives was appellee's attending physician and without objection he testified on behalf of appellee and detailed the injuries which appellee received. He stated that appellee suffered a compound, comminuted fracture of both bones of the left leg and that on January 23, 1934 a fragment of bone was removed from this leg approximately two inches in length and one-quarter of an inch in diameter, resulting in the injured leg being three-quarters of an inch shorter than the right leg. That because of this injury, appellee walked with a slight limp. Counsel for appellee then asked Doctor Ives: "Is this shortening of the leg permanent"? The witness answered in the affirmative, whereupon counsel for appellant stated: "I object to that", and the court then said: "I think he may answer whether or not it is permanent". There was no motion made to exclude the answer, although when the objection was made, the question had already been answered by the

witness. Upon cross examination the witness testified that the fracture had united; that he didn't know whether the left leg would ever be as strong as the right one; that appellee could walk all right but with a limp and that this limp might be corrected by building up the shoe. With all this testimony in the record, the jury could have arrived at no conclusion other than that appellee had been permanently injured and appellant therefore could not have been prejudiced by the physician stating that this shortening of the left leg was permanent.

It is not contended that the verdict of the jury is excessive, therefore if there was any error in admitting this evidence or in giving to the jury that paragraph of the instruction hereinbefore set out, which recited the elements which the jury were to take into consideration in fixing the amount of their verdict, such errors must be deemed harmless.

This record is free from reversible error and the judgment of the trial court will therefore be affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1402
PUBLISHED IN ABSTRACT

George Grein, Plaintiff-Appellant, v. Cora Grein,
Defendant-Appellee.

Appeal from the Circuit Court of Champaign County.

APRIL TERM, A. D. 1935.

281 I.A. 614⁵

Gen. No. 8909

Agenda No. 18

MR. JUSTICE FULTON delivered the opinion of the Court.

This is a suit for divorce brought by the Appellant George Grein against his wife Cora Grein, Appellee, in the Circuit Court of Champaign County. The complaint charges that the parties were lawfully married on the 30th day of June, A. D. 1930, and that they lived together as husband and wife until the 8th day of April, A. D. 1931, on which date the Appellee Cora Grein, left the Appellant without any reasonable cause and wilfully deserted and absented herself from the Appellant for the space of one year and upwards.

The Appellee, Cora Grein, filed a motion in writing asking that the complaint be made more definite and certain in the following respect:

"That the plaintiff be required to state in his complaint the exact date the plaintiff intends to rely on to constitute the years' desertion for the reason that a portion of said time from the 8th day of April, 1931, alleged in the complaint as being the day that this defendant wilfully deserted the plaintiff, has been litigated in case No. 9425 had in this Court in the September Term, A. D. 1932, and determined that there was no desertion."

The Appellant George Grein filed a motion to strike the above motion of Appellee from the files. Neither the abstract of record nor the record itself in this cause disclose the ruling of the Court upon either of said motions but Appellant asserts in his brief and it is concurred in by the brief of Appellee that the trial court denied the motion of Appellant to strike Appellee's motion from the files and granted the motion of Appellee to make the complaint more specific. Thereupon, the Appellant amended his complaint upon its face charging the Appellee with desertion beginning on the 30th day of December, A. D. 1932. The Ap-

pellee answered the complaint as amended denying the charge of desertion and denying that Appellant was entitled to any relief prayed for in the complaint. The answer further averred that the Appellant refused to permit the Appellee to live with him and drove her away from his home on several occasions during the desertion period alleged in the complaint and refused to permit Appellee to return to him as his wife.

The evidence shows that the Appellee did leave the home of Appellant on April 8th, A. D. 1931, and never lived there again. While the record does not clearly show the fact, it seems to be conceded on both sides that after leaving the home the Appellee brought a suit for separate maintenance against the Appellant which was heard at the September Term, A. D. 1932, of said Circuit Court and on December 30th, A. D. 1932, a decree of separate maintenance was denied to the Appellee who was the plaintiff in that cause.

The Appellant testified that Appellee had not lived with him for more than one year prior to February 24th, A. D. 1934, the date of filing the complaint in this suit; that she had not offered to return to live with him and that he gave her no cause for leaving him; that he had always treated her as a husband should treat a wife; that he had not seen his wife nor had any conversations with her since the suit for separate maintenance was tried. The Appellee testified that on April 8th, 1931, when she left the home that she did not leave of her own free will and accord but that Appellant told her to leave or he would kill her. This statement is not denied by the Appellant. Appellee further testified that in August, 1933, she went to Appellant's home on two different occasions and offered to return to Appellant and resume marital relations and that during the summer she met the Appellant on the street and renewed her offer to return and live with Appellant but that said offers were all refused. This testimony is specifically denied by the Appellant.

The Appellant charges first that the Court erred in granting the motion of the Appellee to make the complaint more definite and specific with respect to the date of the desertion which compelled Appellant to amend his complaint fixing the date of desertion on December 30th, 1932, instead of April 8th, 1931. When the Court entered his order allowing the motion the

Appellant then had the right to elect to stand by his complaint the motion being in the nature of a demurrer. In order to raise this question on appeal the party whose pleading was held to be defective must stand by his pleading in order to question the ruling of the Court. In this case the Appellant elected to amend his pleading and thereby waived any right to have the objection raised on this appeal. *People v. Opie*, 304 Ill. 521.

We do not understand that the provisions set forth in section 74 of the New Civil Practice Act changes this principle of law.

"The privilege of direct review of civil proceedings by the Appellate and Supreme Courts is neither extended nor restricted by the Civil Practice Act." Ill. Civil Practice Act by O. L. McCaskill 217.

On the question of wilful desertion for the period of one year and upward prior to the filing of the complaint there is a sharp conflict in the testimony between the Appellant and the Appellee. The trial court had the opportunity of seeing the witnesses and observing their demeanor on the stand and was in better position to judge the truth of the testimony than a reviewing court and there is nothing in the record to warrant this Court in finding that the trial court was in error as to his finding upon this question of fact. We do not feel that the Court is warranted in disturbing the decree of the Court on this material issue.

The Appellant further urges that the Court erred in refusing to admit in evidence Appellant's exhibit number one, which was a copy of a letter, neither signed nor identified, with the parties to this suit. He also insists that the Court erred in refusing to admit into evidence the Appellant's exhibits numbers four and five which referred only to business matters and not material to the issues being tried in this suit for divorce.

Appellant further contends that the Court erroneously excluded the testimony of Emory A. Metz which tended to show that Appellee was seen talking with another man in a grocery store during the period covered by the alleged desertion and that such evidence tended to show that Appellee did not want to live with Appellant because she was keeping company

with some one else. We can see nothing in this testimony which even tends to prove any of the material issues in this case and believe that the ruling of the Court excluding such testimony was correct and proper.

We find no substantial error in the ruling of the Court and hold that the Appellant has failed to point out any reason for a reversal of a decree of the trial court and the same should be affirmed.

Affirmed.

(Four pages in original opinion.)

PUBLISHED IN ABSTRACT

Lula Theivagt, Administratrix of the Estate of Anna
Mae Theivagt, Deceased, Plaintiff-Appellant,
v. Johnson Oil Refining Company, a
corporation, Defendant-Appellee.

Appeal from the Circuit Court of McLean County.

APRIL TERM, A. D. 1935.

281 I.A. 615

Gen. No. 8908

Agenda No. 17

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This is a suit brought by Lulu Theivagt, administratrix of the estate of Anna Mae Theivagt, deceased, against Johnson Oil Refining Company, a corporation on account of an accident which occurred on June 18, 1934, wherein Anna Mae Theivagt, a girl of three and one-half years, was struck by an 8,500-pound truck belonging to the defendant-appellee, knocked to the street, and sustained injuries from which she died the same day, leaving a mother, thirty-five years old, a father thirty-six years old, and a sister, six and one-half years old. The accident occurred at the intersection of Church and University streets, in Normal, Illinois.

A complaint was filed by the administratrix under the Injuries Act, on August 17, 1934, in the Circuit Court of McLean County. This complaint contained all necessary allegations as to the next of kin, pecuniary loss, time of filing the suit, and appointment of the administratrix, and charged the defendant-appellee with the following acts of negligence causing death of plaintiff-appellant's intestate:

"a. Operation of the truck with defective brakes and inability to slacken the speed of the truck due to the condition of the brakes.

"b. Operation with defective brakes and inability to stop the truck until plaintiff's intestate was mortally injured.

"c. Failure to sound horn or give other signal or warning on approaching intersection.

"d. Operating truck at speed greater than reasonable and proper having regard to the traffic and use of the way and at a speed which endangered persons rightfully on the intersection contrary to the provisions of Section 22 of the Motor Vehicle Act.

"e. Otherwise so negligently managing and operating the truck at the intersection that it ran into the plaintiff's intestate."

No jury demand was filed by either side, and this case was tried by the court without a jury. At the close of all the evidence the court found the defendant-appellee not guilty, and entered judgment upon said finding. It is from this finding and judgment that plaintiff-appellant prosecutes this appeal.

The facts as disclosed by the evidence are substantially as follows: On June 18, 1934, plaintiff-appellant's decedent had attended the morning session of the childrens' beginning Bible School in a church on the northeast corner of Church and University streets. The child's mother provided escort to the school. The class of about twelve children was dismissed at eleven-thirty. A teacher escorted the children in front of the church, and assisted one child into a Ford sedan parked in front of the church, on Church street, about five feet north of the cross-walk. At this time four small children, including the deceased, were standing behind the parked Ford. The teacher told the children to wait until she looked to see if there was a car coming. The teacher observed a large oil truck approaching the intersection from the north, some thirty or forty feet back. She then stepped toward the children but they had run out into the intersection, crossing the street on the run. No horn was sounded. Three of the small children emerging from behind the parked car passed safely in front of the truck, but plaintiff-appellant's decedent was struck. After the accident several tests were made of the brakes, and the testimony is conflicting as to whether or not the brakes were in good working condition.

It appears from the evidence that the truck was being driven at from twelve to fifteen miles per hour, and on the right side of the center line; that the road was clear, with no cars approaching from the east or west; that there was no apparent motion in any of the groups that were visible to the operator of the truck;

that he saw no children because they were hidden from his view by the parked Ford; that they suddenly darted out in front of him; that he immediately applied the brakes and the truck stopped very shortly, although there is a dispute as to the distance it moved after the children appeared in the operator's view. In any event, the deceased child was knocked down by the front bumper. The rear wheels of the truck did not run over her, although she was pushed along by a rear wheel for about three feet. This, in brief, is a statement of the evidence, and while not giving the testimony in minute detail, is sufficient for the purpose of this opinion.

Plaintiff-appellant contends that the judgment of the trial court finding the defendant-appellee not guilty, and in failing to find the defendant-appellee guilty and assessing plaintiff-appellant's damages, constitutes such error as to justify this court in reversing the trial court's finding and judgment, and in entering judgment for the plaintiff-appellant, and assessing damages for the pecuniary loss sustained.

Plaintiff-appellant contends that plaintiff-appellant's intestate was incapable of contributory negligence because she was only three and one-half years of age, and cites numerous cases in support of that proposition. In all of this we are in entire agreement. Plaintiff-appellant next insists that the defendant-appellee was guilty of negligence, and cites numerous cases and texts in support of various propositions as to the care required of motorists towards children; the duty of drivers to give warning of approach to pedestrians at intersections; as to speed and control of automobiles; as to the duty where there is an obstruction to an automobilist's view, and as to the duty in keeping the automobile in reasonably good condition and properly equipped. We do not deem it necessary to analyze any of these cases further than to point out that most of them are cases where an appellate court refused to disturb the finding of a jury on a given state of facts.

This case was tried without a jury and the court exercised the functions of a jury. His determination of facts in this case, at least, is as binding upon this court as the finding of fact of any jury. The evidence as heretofore set forth shows that there was much controversy as to what occurred at this intersection,

and also as to the condition of the brakes on the truck. The trial court saw fit to believe certain witnesses, and found, as a matter of fact, from the evidence, that the defendant-appellee was guilty of no negligence. Such a finding of the court upon the evidence, no less than the verdict of a jury, is conclusive of the facts unless there is error in law in the proceeding, or unless the finding is so manifestly against the weight and preponderance of the evidence that a reviewing court may say it is the result of passion, prejudice or mistake, a contention seldom urged against the finding of a court, though common enough in seeking to set aside the verdict of a jury. (*Gratiot Street Warehouse Co. v. St. Louis A. & T. H. R. R. Co.*, 122 A405 affirmed 221 Ill. 418). The same rule has been applied by our Supreme Court in reviewing decrees in equity, and it has been held that where the chancellor makes a finding of fact from conflicting testimony heard by him his finding will not be disturbed on review unless it is clearly against the weight of the evidence. (*Krabbenhoft v. Gossau*, 337 Ill. 396).

It must be borne in mind that the trial court in a law suit, or the chancellor in an equity proceeding heard before him, has an opportunity to hear the witnesses, to observe their demeanor, and candor or lack of it, which is denied to a reviewing court, and that therefore, the trial courts are in a much better position to form an opinion of the relative merits and weights of the testimony given. So it is not within the province of this court to substitute its opinion for that of the trial court as to the facts, unless manifestly against the weight of the evidence. (*Wear Proof Mat. Co. v. Bastian-Morley Co.* 268 Ill. App. 455). (*Gratiot Street Warehouse Co. v. St. Louis A. & T. H. R. R. Co.* 221 Ill. 418).

It is, therefore, our opinion that the finding of the trial court, that the plaintiff-appellant had failed to prove by a preponderance of the evidence that the defendant-appellee was guilty of any one or more of the charges of negligence made by the plaintiff-appellant in her complaint is not so manifestly against the weight and the preponderance of the evidence that this court should substitute its opinion for the opinion of the trial court. The judgment of the trial court is, therefore, affirmed.

Judgment affirmed.

(Seven pages in original opinion)

PUBLISHED IN ABSTRACT

Dorothy Jacobus, Plaintiff-Appellee, v. Stephen
Hadsall, Defendant-Appellant.

Appeal from Circuit Court, Fulton County

APRIL TERM, A. D. 1935.

281 I.A. 615

Gen. No. 8911

Agenda No. 20

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This is a suit brought by Dorothy Jacobus, plaintiff-appellee, against Stephen Hadsall, defendant-appellant, to recover damages for personal injuries sustained by plaintiff-appellee while riding in a truck driven by defendant-appellant's agent on October 26, 1933, and said truck collided with a railroad train. The case was tried on the second amended complaint consisting of two counts. The first count charged that on October 26, 1933, plaintiff-appellee was employed as a domestic in defendant-appellant's home; that at the time she entered into the employment it was agreed that defendant-appellant was to furnish transportation from plaintiff-appellee's home at Farmington to defendant-appellant's home, and return to her home when the services were completed; that on the date mentioned plaintiff-appellee had completed her work, and under the terms of her employment, and pursuant to the orders of defendant-appellant, defendant-appellant's wife, as his agent was driving plaintiff-appellee in defendant-appellant's automobile to her home at Farmington, as a passenger for hire, and that she was at all times in the exercise of due care for her own safety; that they were being driven along State Highway, Route 97, and that at the point where said route crosses the tracks of the St. Paul, Minneapolis & St. Louis Railroad Company, the driver of said automobile so carelessly and negligently operated same that it collided with a train on the tracks of the aforementioned railroad, whereby plaintiff-appellee was injured; that it was the duty of the defendant-appellant to exercise ordinary and reasonable care for plaintiff-appellee's safety, and that said automobile was not under the direction or control of the plaintiff-appellee,

and at the time of the happening of said accident plaintiff-appellee was holding an infant child of defendant-appellant in her lap, and was caring for an directing attention to said child. The second count is similar to the first, except that it charges willful and wanton negligence on the part of the operator of defendant-appellant's automobile. Defendant-appellant's answer denied all of the material allegations of these counts, averred that at the time and place in question plaintiff-appellee was riding as a guest, and at her own request, for her own accommodation, without payment, and not upon any mission or service for defendant-appellant; also denied that plaintiff-appellee was in the exercise of due care and caution for her own safety, and denied that the automobile was operated in a willful and wanton manner.

By stipulation of parties this cause was heard before the court, without a jury. At the close of all the evidence the court found the issues for the plaintiff-appellee and entered judgment thereon in favor of the plaintiff-appellee and against the defendant-appellant in the sum of \$1,200. It is from this judgment that defendant-appellant appeals.

Defendant-appellant contends that the judgment of the trial court is contrary to law, is contrary to the evidence; that the trial court erred in rendering judgment for the plaintiff-appellee, and that the damages assessed by the trial court are excessive. He further contends that the plaintiff-appellee was a guest passenger at the time the injuries were received; that the defendant-appellant's automobile was not operated in a negligent manner; that the plaintiff-appellee was not in the exercise of ordinary and due care for her own safety; that the operator of defendant-appellant's car was guilty of no willful and wanton conduct.

It appears from the evidence that plaintiff-appellee had previously worked for defendant-appellant in his home; that he had always furnished transportation to and from plaintiff-appellee's residence to defendant-appellant's residence; that on the occasion in question defendant-appellant desired plaintiff-appellee to work for him, and that about a week before the employment commenced defendant-appellant told plaintiff-appellee that he wanted her to work for him at his home, and that he would come for her when he wanted her, and would bring her home again; that a short time thereafter defendant-appellant's wife came for

plaintiff-appellee, at her residence, and took her to defendant-appellant's residence, a distance of about eight and one-half miles; that on the day she was to return home defendant-appellant told his wife to take plaintiff-appellee to her home; that plaintiff-appellee and defendant-appellant took with them defendant-appellant's baby, a child about two years old, which plaintiff-appellee was holding on her lap; that the day was gray, and it was raining; that a heavy drizzle was falling; that both plaintiff-appellee and defendant-appellant's wife were familiar with the road and with the point where the hard road crossed the tracks of the railroad; that as they approached the crossing the driver of the car slowed down to about ten miles an hour, looked in both directions, but neither saw nor heard any train; that as the automobile was about halfway between the crossing sign at the edge of the right of way of the railroad and the tracks the driver saw the train, endeavored to stop the car, but was unable to do so; that the train struck the front end of the automobile. Plaintiff-appellee was injured, sustaining a fracture of the skull, above the right eye, a cut over the eye, numerous cuts and contusions about the face, hands and legs. She became unconscious, so remained until the following morning, and was in a confused mental state for several days thereafter. She was in the hospital for eleven days, was weak for three or four months, and did no work until the following March 12th. She complains that she still has a pain directly above her right eye, frequent headaches, pain in her eye, can not sleep on her right side, is nervous and irritable; that her earnings were four dollars a week, employed at housework; that immediately prior to the accident she was giving her attention to the baby in her lap, the baby being very active, liked to climb up and sit down, had a habit of kicking the gear shift, which plaintiff-appellee had to watch so that the baby would not interfere with the driver of the automobile; that plaintiff-appellee did not look for trains; that there was no conversation relative to the fact that a train might be approaching; that doctors' bills, hospital bills, nurses' bills, and loss of earnings amounted to about \$272.55. There was testimony to the effect that defendant-appellant's wife stated that the brakes on the automobile she was driving were no good, that she saw the train a short distance ahead, and her brakes were not good enough to

stop; also that defendant-appellant's wife said that the accident was her fault. The alleged admissions by the defendant-appellant's wife were denied by her.

In considering this case it must be borne in mind that this case was tried by the court, without a jury; that the court exercised the functions of a jury, so that his determination of facts in this case are certainly entitled to as much weight, and are as binding upon a reviewing court as the findings of fact of any jury. The court had an opportunity to hear the witnesses, and to observe their demeanor, and he is in much better position to form an opinion of the relative merit and weight of the testimony given than a reviewing court. (*Krabbenhoft v. Gossau*, 337 Ill. 396; *Wear Proof Mat. Co. v. Bastian-Morley Co.*, 268 Ill. App. 455.) A finding of the trial court upon the evidence is conclusive of the fact, unless there is error in law in the proceeding, or unless the finding is manifestly against the weight and the preponderance of the evidence. (*Gratiot Street Warehouse Co. v. St. Louis A. & T. H. R. R. Co.*, 122A, 405 affirmed 221 Ill. 418.) Defendant-appellant contends first that plaintiff-appellee was a guest passenger as defined by paragraph 43 (b) Chapter 95 (a) Cahill's Revised Statutes 1933. It appears from the evidence that transporting plaintiff-appellee to defendant-appellant's home, to perform certain services and then to transport her back to her home again when these services were no longer needed were a part of her contract of hire. There is little controversy about this, but certainly, to so find, is not manifestly against the weight of the evidence. If that is so, then transporting her to and from her home was as much for the benefit of the defendant-appellant as for her to perform household services for him while at his home. To say that she was a guest while riding in the automobile under such circumstances seems to us would be a clear perversion of the purpose, intent, and language of the statute. This view is supported by the case of *Foale v. Linsky*, 279 Ill. App. 58. In that case plaintiff had purchased a mattress from the defendant and wanted to exchange it. Defendant owned two stores, and the son of the defendant took the plaintiff, and his wife, to the second store, to settle some argument concerning the mattress. On the way back from the second store the accident occurred. The contention there raised was that the plaintiff was a guest, but the court held that under the circumstances the

relationship was that of merchant and customer. Many cases are cited from other jurisdictions, where the statutes are similar, to support this view. In our opinion, the relation of employer and employee existed at the time this accident occurred, and the plaintiff-appellee was not a guest passenger in the automobile as contemplated by the statute hereinbefore referred to.

Defendant-appellant next contends that the driver of the defendant-appellant's automobile was not negligent. It appears that the weather was rainy, somewhat foggy, that the pavement was slippery; that the defendant-appellant's wife slowed the movement of the automobile, looked but did not see or hear anything until she had reached a point a short distance from the track, when she saw the train, applied the brakes, but the automobile slid on to the track and was struck by the train. There is also an admission by the driver of the automobile, testified to by another witness, and denied by the driver, that the brakes were no good, and that she could not stop in time to avoid coming in contact with the train on account of bad brakes. The trial court found as a matter of fact that under all these circumstances the driver was negligent. This court does not feel that such finding is so manifestly against the weight of the evidence as to warrant it in substituting its judgment for that of the trial court.

It is next urged by defendant-appellant that plaintiff-appellee was not in the exercise of ordinary and due care for her own safety. There is no hard and fast rule which can be laid down as to what a passenger in an automobile must do in order to comply with this duty, and it must depend upon all of the circumstances. It is ordinarily one of fact for a jury to determine. (*Odette v. C. C. Ry. Co.*, 166 Ill. App. 270; *Thomas v. Buchanon*, 357 Ill. 270; *Morrison v. Flowers*, 303 Ill. 189.) In this case it must be particularly borne in mind that plaintiff-appellee was charged with the duty of looking after defendant-appellant's child, who was sitting in her lap, and whose activities demanded close attention, particularly to prevent the child from interfering with the operation of the automobile. Again we are constrained to say that the finding of fact of the trial court that plaintiff-appellee was exercising due care should not be disturbed by this court.

Defendant-appellant's fourth contention, that the driver of the automobile was not guilty of willful and wanton conduct we will not consider because it is not necessary that it be determined for a decision of this case. It may well be that the evidence does not support a charge of wanton and willful conduct, nor is it necessarily true that the trial court so found.

Defendant-appellant's last contention is that the damages assessed by the trial court are excessive. The judgment was for \$1,200. Approximately \$275 was proved as actually expended for medical, hospital and nursing bills, for damages to clothing, together with loss of wages. Plaintiff-appellee suffered a fractured skull, fracture over the right eye brow, a bad cut over the right eye, face badly cut, legs and arms badly bruised. She was in the hospital for eleven days, was unconscious until the day after the accident, was quite mentally disturbed for four days; and appeared to be rather dazed for some considerable time thereafter. After she was removed from the hospital she was very weak and nervous; she suffered severe pains; did not **work from** October 26th until the early part of the following March. At the time of the trial she testified that she was still suffering from the effects of the accident. From a recital of the foregoing it seems hardly necessary to say that the finding of the trial court is well supported by the evidence. Courts of review are reluctant to disturb the judgment of the trial courts as regards the amount of damages awarded, and in this case we see no reason for so doing.

For the reasons set forth it is the opinion of this court that the findings and judgment of the trial court should be, and are hereby affirmed.

Judgment Affirmed.

(Eleven pages in original opinion.)

91.70
Opinion filed April 11, 1935
Hearing done Oct. 1, 1935
ab an Abstract
57
A
PUBLISHED IN ABSTRACT

Arthur A. Marer & Company, a Corporation, Appel-
lant, v. Estate of M. J. Wolford, Deceased, and
Palmer National Bank, a Corporation, Charles
F. Shane and Roscoe S. Fairchild, as Ex-
ecutors of the Last Will and Testament of
M. J. Wolford, Deceased, Appellees.

Appeal from the Circuit Court of Vermilion County.

APRIL TERM, A. D. 1935.

281 I.A. 615³

Gen. No. 8769

Agenda No. 16

MR. JUSTICE DAVIS delivered the opinion of the Court.

This cause was before this court at a former term (*Marer & Company v. Est. of Wolford*, 272 Ill. App. 305) and without passing upon the merits, a judgment was erroneously entered reversing and remanding said cause to the circuit court with directions to dismiss the claim of appellant because of lack of jurisdiction in that court to try the same. On the application of appellant a certificate of importance and appeal was granted and the Supreme court, for the error indicated, reversed the judgment and remanded the cause to this court for its consideration upon the merits.

M. J. Wolford died testate May 28, 1928, naming appellees as executors of his will. Appellant filed its claim against his estate in the Probate court of Vermilion county in the sum of \$127,400.00 on June 3, 1929. Claimant alleged that on December 15, 1926, it entered into a contract with the Danville Hotel Company by which it agreed to furnish and equip the Wolford Hotel with all necessary household and hotel equipment, furniture, carpets, etc.; that on November 24, 1926, John H. Harrison and M. J. Wolford entered into an agreement to guarantee the payment of said hotel furniture; that it completed the furnishing of said hotel about September 1, 1927; that it received \$26,600.00 in cash, leaving a balance due of \$127,400.00; that said hotel company was insolvent and was adjudged a bankrupt on August 19, 1927, and that there

was due claimant \$127,400.00. Attached to the claim was a copy of a contract, dated December 15, 1926, entered into between the Danville Hotel Company and Arthur A. Marer & Company, claimant.

On March 26, 1932, claimant filed an amendment to its claim in which it alleged it completed the furnishing of the said hotel, except the furnishing and laying of carpeting and ozite of the value of \$1100.00, in, to-wit: eleven rooms in said Wolford Hotel; that it was at all times ready and willing and able to furnish and lay said carpeting and ozite, and would have done so but for the reason that said Danville Hotel Company was adjudged a bankrupt and the receiver refused to permit or authorize claimant to so furnish and complete the laying thereof. Upon a hearing of said claim the Probate court entered judgment for the sum of \$80,599.00 to be paid in due course of administration.

The executors of said estate appealed to the circuit court of said county. A jury was waived and the trial of said cause was commenced, and on motion of the claimant leave was given to amend said claim. A copy of a contract of date October 9, 1926, between Arthur A. Marer & Company and the Danville Hotel Company, and a copy of a trust deed, mentioned in a contract of date of November 24, 1926, and a copy of a chattel mortgage and of an underwriter's agreement were attached to and made a part of said claim. It alleged that it installed all of the carpeting and furniture, mentioned in the contract dated November 24, 1926, except the carpeting and ozite for eleven rooms; that after the execution of said contract, dated November 24, 1926, by mutual agreement and understanding of all the parties thereto, the quality of such furniture and equipment was increased and additions in quantity made whereby the total agreed purchase price was increased from \$115,000.00 to \$154,000.00; that changes in quality, quantity and purchase price and the execution of said contract, dated December 15, 1926, were well known to and acquiesced in and agreed to by said M. J. Woford; that on December 11 and December 15, 1926, to induce claimant to enter into, execute and sign said contract with the hotel company, to sell it and agree to install in said hotel said carpeting, equipment and furniture, said Woford, before the entering into of said contract dated December 15, 1926, did advise and state to claimant and to

an attorney of claimant that said contract dated November 24, 1926, had been signed by himself and said John H. Harrison; that a copy of the wording of the same was not accessible to be seen by claimant and its attorney because the same was in Tennessee; that because of said statement and inducements of said Wolford and upon the reliance of the truth of which claimant agreed to sell and install into said hotel said equipment. Further evidence was heard after said amendment, and a judgment was entered in favor of said estate and against claimant in bar of the action and for costs.

The Danville Hotel Company, an Illinois corporation, was erecting and preparing to furnish the Wolford Hotel at Danville, Illinois, John H. Harrison was president and M. J. Wolford treasurer of said corporation. In order to secure money for the construction of the hotel an underwriter's agreement was entered into with Caldwell & Company, a Tennessee corporation, to underwrite and dispose of bonds of the Danville Hotel Company aggregating a total principal amount of \$700,000.00, dated March 1, 1926, to be secured by a trust deed upon the hotel property and a chattel mortgage upon the furnishings of all descriptions.

Among the provisions contained in said trust deed was the following: "Said owner further covenants and agrees that it will promptly furnish all moneys necessary, in addition to, and prior to, the use of the proceeds of this bond issue, to complete and furnish the Wolford Hotel, now being erected upon said property, in accordance with the plans and specifications made by Hall, Lawrence Rippel & Ratcliffe, architects, and that it will have same promptly completed and furnished, without interruption or delay in the work, and, immediately upon completion, that it will commence, or have commenced, the operation of said hotel."

November 24, 1926, the Danville Hotel Company had on hand money estimated as sufficient, in addition to the proceeds of the bonds, to complete the hotel building but not an amount sufficient to furnish the hotel.

Under the terms of the underwriting agreement, dated February 13, 1926, the underwriter, Caldwell & Company, was made custodian of said bond issue, and refused to make further disbursement of said proceeds

on the erection of said hotel, unless and until the Danville Hotel Company had in hand sufficient money to furnish the hotel building, or assurance was given that the furnishings would be absolutely installed free of lien.

John H. Harrison and M. J. Wolford, acquiescing in the correctness of the foregoing and in order to assure Caldwell & Company that the furnishings would be absolutely installed free of lien, expressed a willingness to guarantee the installation of said furnishings. On November 24, 1926, they entered into a contract with Caldwell & Company. The foregoing is the substance of what was recited in the preliminary statement of said contract. By its terms it was agreed:

"1. That the parties of the first part, (Harrison and Wolford,) do hereby guarantee the installation in the Wolford Hotel, at Danville, Illinois, on or before December 15, 1926, by Arthur A. Marer & Company, of Chicago, Illinois, of the furniture, of the price or value of \$115,000.00, mentioned in the contract of date October 9, 1926, and exhibit thereto, between said Arthur A. Marer & Company, which written contract and exhibit are hereby referred to and made a part hereof, agreeing, if the hotel company does not promptly pay, to pay for said hotel company all of the payments therein required to be made before the installation is completed, when said payments are due."

"2. That the parties of the first part will also have installed on or before December 15, 1926, in the Wolford Hotel, free of lien and subject to the lien of the chattel mortgage of the Liberty Central Trust Company and Miller, Trustees under the mortgage securing the aforesaid bond issue, the following character of furniture or equipment by the following parties, or by other parties satisfactory to the party of the second part, and in approximately the following amounts:

| | |
|---|------------|
| China—Arthur Schiller & Sons, 50% cash | |
| balance six months..... | \$3,007.90 |
| Silver—Rogers Bros.,—International Silver | |
| Company, | 2,488.79 |
| Kitchen Equipment—Wm. F. Traub Range | |
| Company | 15,680.69 |
| Waste Baskets—Marshall Field Company.. | 180.00 |
| Linens—Carson Pirie Scott Company, Mar- | |
| shall Field Company..... | 6,763.25" |

Other items of furniture and equipment, the amounts to be paid therefor, and the names of the persons

from whom such articles were to be purchased were inserted, totalling the sum of \$55,000.00 in all.

This paragraph then concludes:

"The parties of the first part will promptly pay for the above character of furnishings and equipment, when payments are due, if the hotel company does not do so, so that the installation of same promptly and free of lien is assured."

"3. The party of the second part in nowise waives the right to see that said furnishings are suitable and sufficient and, if they, or any part of them, are not suitable or sufficient in the opinion of the party of the second part, the parties of the first part guarantee that additional furnishings will be installed promptly to make the total furnishings sufficient, and that unsuitable furnishings will promptly be replaced."

"4. The party of the second part will, so long as the aforesaid promises and covenants of the parties of the first part are each and all observed, as well as conditions for the payment of the bond proceeds on construction (other than the having in hand of sufficient moneys for furnishings) are met, will disburse proceeds of the bond issue on the construction of the hotel building."

The Danville Hotel Company and Arthur A. Marer & Company had entered into an agreement for the furnishing of the hotel, and a contract was prepared to be executed by them, which was dated October 9, 1926, whereby the hotel company agreed to purchase from Marer & Company at approximately \$115,000.00, subject to such additions and deductions, or credits as might be mutually agreed upon, the furnishings and equipment set forth in "Exhibit A," attached to said contract, the hotel company agreeing to pay said purchase price, as follows: The sum of \$5,000.00 upon the signing of the contract; the sum of \$5,000.00 on October 15, 1926; and the sum of \$5,000.00 on November 15, 1926; and upon the first shipment of merchandise arriving in the city of Danville, Illinois, an additional sum of \$18,333.33; the balance to be payable in thirty equal installments to be evidenced by notes, dated November 15, 1926, and the first note thereof and the balance of said notes to fall due on or before every thirty days thereafter consecutively.

The contract of date, October 9, 1926, was never signed by Arthur A. Marer & Company nor by the Danville Hotel Company, Marer & Company not being

satisfied with the terms of payment. After further negotiations between the Danville Hotel Company and Arthur A. Marer & Company a contract was entered into and executed by said parties on December 15, 1926, in and by the terms of which the hotel company agreed to purchase and Marer & Company agreed to install in said Wolford Hotel all of the furnishings and equipment as set forth in "Exhibit A," attached to said contract. In this contract other and more expensive furniture and equipment was purchased, and the total amount agreed to be paid was increased from \$115,000.00 to \$154,000.00. The sum of \$24,000.00 was paid in cash, and eighteen promissory notes were executed and delivered by the Danville Hotel Company for the balance of the purchase price, seventeen of which were for the sum of \$2600.00 each, and due consecutively every thirty days after December 15, 1926, and one of said notes was in the sum of \$85,800.00, due eighteen months after December 15, 1926.

John H. Harrison died a short time after the death of M. J. Wolford. On March 13, 1931, in consideration of the sum of \$63,189.63 Arthur A. Marer & Company covenanted and agreed not to sue the estate of John H. Harrison, deceased, to enforce any claim or liability it might have against said estate on account of John H. Harrison having acted as a director or been connected in any manner with the Danville Hotel Company. On August 19, 1927, the Danville Hotel Company was adjudged bankrupt. Appellant filed its claim against said estate and received a dividend upon its claim of \$3,631.00.

Appellant bases its right of recovery on the contract, dated November 24, 1926, between Caldwell & Company and John H. Harrison and M. J. Wolford, and contends that those named therein, for whose benefit it was executed, may sue thereon, and for such reason Marer & Company have a right of action against the estate of M. J. Wolford.

Appellees say that there has never been any contention that Marer & Company could not sue under paragraph 1 of the contract, if there was anything due to it under the facts, and claim that said paragraph cannot possibly be construed to obligate Wolford and Harrison to make any payment to Marer & Company, except the cash payment required under the contract of date October 9. It is also contended that under paragraph 1 there was no unlimited promise to pay for

the \$115,000.00 worth of furniture. There was a guarantee of the installation of that amount of furniture, but only the promise to make the cash payments required by the unsigned contract of date October 9. That the right of appellant to sue, if any, must be found in the promise to pay and not on the special guarantee to install the furniture.

The question of the construction of this contract was before this court in the case of *Carson Pirie Scott & Co. v. Parrett, et al.*, 261 Ill. App. 200, and was also before our Supreme court in the same case, reported in Vol. 346, page 253.

In that case *Carson Pirie Scott & Co.* sued to recover for linens furnished to the Danville Hotel Company for use in the Wolford Hotel, under the terms of paragraph 2 of the contract of date November 24, 1926, which Harrison and Wolford had agreed to have installed, and to pay for in case the hotel company did not pay, while the claim of Marer & Company is for the recovery under the terms of the contract of date November 24, 1926, of the price or value of furnishing mentioned in the contract of date October 9, 1926, and exhibit thereto, referred to in paragraph 1 of said contract dated November 24, 1926, the installation of which, in the Wolford Hotel, was guaranteed by Harrison and Wolford, and which were installed by Marer & Company and for which it claims Harrison and Wolford agreed to pay in case the hotel company did not pay.

It is true that the furniture installed was of greater value and quantity than that mentioned in said contract of date October 9, 1926, which provided that the furnishings and equipment set forth in "Exhibit A" attached were to be paid for at prices therein specified, which was approximately \$115,000.00, subject to such additions, deductions or credits as might be mutually agreed upon. The parties to said contract, the Hotel Company and Marer & Company, by the contract entered into on December 15, 1926, mutually agreed to the additions in quality and number of the articles contained in said "Exhibit A" of the contract of date October 9, 1926, and to increasing the purchase price from \$115,000.00 to \$154,000.00, of which M. J. Wolford had notice and for which he was bound under the terms of the contract of date November 24, 1926.

It was also provided in paragraph 3 of said contract of date November 24, 1926, that Caldwell & Company

in nowise waived the right to see that all furnishings were suitable and sufficient, and, if they, or any of them, were not suitable or sufficient in their opinion, Harrison and Wolford guaranteed that additional furnishings would be installed promptly to make the total furnishings sufficient, and that all unsuitable furnishings would be promptly replaced, from which it appears that the guarantee of Harrison and Wolford to install furnishings was not limited to furnishings of the value of \$115,000.00, or to the articles named in "Exhibit A" of said contract of date October 9, 1926, but that the same could be and was increased by mutual agreement of said hotel company and Marer & Company.

What was said by our Supreme Court in construing this same contract of date November 24, 1926, with reference to the right of a third person not a party to sue upon this contract, is controlling in this case. In its opinion the court said: "There is but one question in this case, and that is whether appellee has a right to sue on the contract between Harrison and Wolford and Caldwell & Company. The rule is well settled in this State that if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract."

The court further held: "It is a cardinal rule of construction of written contracts that the court will look at the entire contract and construe it according to the intention of the parties as the same appears from the language of the instrument. It appears from the contract that the hotel company did not have on hand money sufficient to furnish the hotel, and that Caldwell & Co. would make no further advancements until the hotel company had sufficient funds or gave assurance that the furnishings would be installed without lien. The preliminary statements concerning the contract as set out in the instrument itself disclose the reasons for the refusal of Caldwell & Co. to advance further funds, and also assert agreement with Caldwell & Company in that matter and a willingness on the part of Harrison and Wolford to bring about the installation of the furnishings."

"The rule is, that the right of a third party benefited by a contract to sue thereon rests upon the lia-

bility of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed, the liability so appearing can not be extended or enlarged on the ground, alone, that the situation and circumstances of the parties justify or demand further or other liability."

Commenting further upon the liability of Harrison and Wolford to the third person, Carson Pirie Scott & Co., the court in its opinion further said: "It will be observed that by paragraph 2 of the contract, Harrison and Wolford, as parties of the first part, agree to 'have installed on or before December 15, 1926,' and subject to the lien of the chattel mortgage of the trustees, 'the following character of furniture or equipment by the following parties, or by other parties satisfactory to the party of the second part and in approximately the following amounts'. Thereafter in that paragraph appear certain items of furnishings and names of persons to furnish the same, including appellee. This paragraph then concludes: 'The parties of the first part will promptly pay for the above characters of furnishings and equipment when payments are due, if the hotel company does not do so, so that the installation of same promptly and free of lien is assured.'"

While the whole contract was considered by the court in determining the question presented, it will be seen that the extent of the liability was fixed by the provisions of the second paragraph of said contract.

It is insisted by appellee that the obligation of Harrison and Wolford under paragraph 1 of the contract was two-fold: a guarantee of installation and that Harrison and Wolford would make the cash payments. That the construction contended for by appellant that there was an unlimited obligation to make all payments is unwarranted and that the obligation of Harrison and Wolford was to pay for said hotel company all the payments therein required to be made before installation is completed when said payments are due, if the hotel company did not promptly pay. That the obligation was not to make 'all payments to be made before installation is completed,' but to make all payments therein required to be made before installation is completed.'" "Therein required" clearly refers to the unsigned contract of October 9, which limits those payments to the ones that were not covered by installment notes.

The liability of Wolford was fixed by the contract of November 24, 1926, in which the contract of October 9, 1926, was referred to and made a part, and under the holding in the case of *Carson Pirie Scott & Co. v. Parrett, supra*, his liability so appearing cannot be extended or enlarged on the ground, alone, that the situation and circumstances of the parties justify or demand further or other liability.

Negotiations had been in progress concerning the furnishing of the hotel building for some months and Caldwell & Company, the underwriters of the \$700,000.00 bond issue, were anxious to have the furnishings installed because the building was nearly completed. The Danville Hotel Company to secure said loan having given a trust deed upon the hotel property and a chattel mortgage covering all of the furniture and equipment of every kind and under the terms of the trust deed the hotel company was obligated to furnish all moneys necessary, in addition to, and prior to, the use of the proceeds of the bond issue to complete and furnish the hotel, and Caldwell & Company, wanting said furnishings to be installed free of any lien, it resulted in the making of the contract of date November 24, 1926, and the contract between the hotel company and Marer & Company of date December 15, 1926.

Upon the execution of the contract of date December 15, 1926, Marer & Company wrote a letter to Caldwell & Company, in which it agreed to install the furnishings free of any lien or incumbrance thereon and subordinate to the lien of the trust deed and chattel mortgage. By the waiver of any lien by Marer & Company and by the obligation entered into by Harrison and Wolford, Caldwell & Company were willing to make further disbursements from the proceeds of the bond issue. It will be seen that, in order to satisfy Caldwell & Company, Harrison and Wolford were not required to guarantee to pay for all furniture installed. It was only necessary to satisfy Caldwell & Company that the furniture be installed free of lien and of such quality and quantity as should be sufficient and suitable and that they obligate themselves to pay for all payments that fell due before such furniture was installed.

Considering the entire contract it appears clear to us that it was the intention of the parties and Harrison and Wolford obligated themselves to guarantee

the installation in the Wolford Hotel by Arthur A. Marer & Company the furniture of the price of approximately \$115,000.00 mentioned in the contract of date October 9, 1926, and exhibit thereto, with such additions as might be mutually agreed upon by the hotel company and Marer & Company, and agreed, if the hotel company did not promptly pay, to pay for said hotel company all of the payments to be made before installation of said furnishings was completed, and when said payments were due. This agreement to pay was to make only such payments as became due before the installation was completed, and not for all of the furnishings.

Appellant contends that the executors of the Estate of M. J. Wolford are estopped from taking the position that the contract of date November 24, 1926, was not an absolute and unconditional guarantee that Marer & Company would be paid for all furnishings installed in the Wolford Hotel by it. That when Mr. Marer and his attorney talked with Mr. Wolford, a positive obligation arose binding Mr. Wolford to correctly interpret or state the exact terms and effect of said contract, and since he incorrectly informed Mr. Marer and his attorney, he estopped himself and his estate from claiming any construction other than that which he gave them.

John H. Harrison and M. J. Wolford were interested in the construction of the Wolford Hotel and in November, 1926, when Caldwell & Company refused to make further disbursements of the proceeds of the bond issue until assurance was given that the furnishings would be installed free of lien, Harrison and Wolford were willing to guarantee the installation of the furnishings free of any lien that Marer & Company might have on the furnishings. It appears from the evidence that Mr. Wolford was in close touch with what was going on concerning the erection and furnishing of the hotel. He attended the meetings of the board of directors of the Danville Hotel Company. He had selected an apartment in the Wolford Hotel which he expected to occupy when the hotel was ready for occupancy, and was frequently at the hotel building when the furniture was being installed. He knew the contract of October 9, 1926, had not been executed and knew that the furnishings therein provided for had not been installed up to December 15, 1926, as provided for in the contract of date November 24, 1926.

Negotiations between the Danville Hotel Company and Marer & Company, with reference to the furnishing of the Wolford Hotel, began in September, 1926, and a list of furnishings was drawn up and was finally approved by the hotel company and Marer & Company, a copy of which was attached to the contract of date October 9, 1926, and marked "Exhibit A." This list was gone over by representatives of the hotel company and Marer & Company between October and December, and changes were made mostly in the quality but not much change in the number of pieces that went into the hotel.

Wolford knew of these changes. Marer was in Danville and called upon Wolford at his office in the Palmer National Bank, and a conversation was had concerning the delay in furnishing the hotel. After this conversation the contract of date, December 15, 1926, was executed by appellant and the Danville Hotel Company, and on that day Wolford, as treasurer of the hotel company, gave Marer a check for \$14,000.00 to apply on said contract, which, with two previous payments of \$5,000.00 each, made up the cash payment of \$24,000.00.

John Meara, who had the contract to lay the carpeting, was present when Marer had the conversation with Wolford and testified that Wolford said to Marer: "What's the trouble? Let us get together and start this hotel." Marer replied, "That's what I came down for," and asked Wolford about a contract. He said he had signed one, and Mr. Marer says: "Let's see the contract." He says, "You know, Mr. Marer, that Mr. Harrison is worth a million dollars, and I am worth some myself, and, my boy, I will take care of you."

Joseph Slatto, attorney for appellant, testified that he had a conversation with Mr. Wolford at the Palmer National Bank on December 15, 1926, with reference to the furnishing of the hotel by Mr. Marer; there was quite a lot of conversation for the few minutes that he and Mr. Marer were there; I told him, my recollection was, that I did not want Mr. Marer to go into the deal because I didn't feel we were secure; I wanted a chattel mortgage on all of the furniture, and told him I was informed that he and Mr. Harrison executed a document, in the nature of a guarantee or indemnity, in which they agreed to pay all of the costs of the furnishings that went into the hotel that

was furnished by Arthur A. Marer & Company. Mr. Wolford said we needn't worry about it, that the bills would be paid and he and Mr. Harrison did execute a document in which they agreed to pay for the furnishings. I asked Mr. Wolford whether or not the document could be presented for my examination. I asked him that, and he told me it was in the possession of Caldwell Investment Company.

Upon receipt of the contract of date, November 24, 1926, by Caldwell & Company disbursement of funds, proceeds of the bond issue, was resumed, and on November 26 a payment of \$60,167.38 was made on building construction; and on December 16, upon receipt of the contract of date December 15, 1926, entered into between Marer & Company and the hotel company, and the waiver of Marer & Company, an additional \$12,000.00 was paid.

After this conversation with Mr. Wolford, Arthur A. Marer & Company entered into the contract with the Danville Hotel Company of date December 15, 1926, and immediately commenced the installation of the furnishings and also wrote the letter to Caldwell & Company waiving any lien on the furnishings.

The evidence clearly shows that Arthur A. Marer & Company were induced to enter into the contract by the statements made by Mr. Wolford. Arthur A. Marer & Company having acted upon the representations of Mr. Wolford and having entered into the contract of December 15, 1926, and having fulfilled the terms of said contract the executors of the estate of M. J. Wolford, deceased, will not now be permitted to contend that Mr. Wolford did not guarantee to pay for all of the furnishings installed by Marer & Company, but only guaranteed to make such payments as fell due before installation was completed.

M. J. Wolford was estopped to deny his statement to Mr. Marer, the president of appellant, and its attorney, Mr. Slatto, that he and Mr. Harrison had obligated themselves to pay for the hotel furnishings and his personal representatives are likewise estopped.

In the case of *Shapera v. Fargo, et al.*, 240 Ill. App. 145, it is said: "It may be said as a general statement of law that an equitable estoppel or estoppel *in pais* which is now available at law as well as in equity, arises whenever one by his conduct, affirmative or negative, intentionally or through culpable negligence, induces another to believe and have confidence in cer-

tain material facts, and the latter having the right to do so, relies and acts thereon, and is, as a reasonable and inevitable consequence, mislead, to his injury."

In *Gillett v. Wiley*, 126 Ill. 310, our Supreme Court said: "It is not essential to the creation of estoppel that there should be an actual fraudulent intent at the time of making the declaration or performing the act upon which the other party has relied, but it is essential that there should be voluntary acts or declarations by which another is made to believe in the existence of certain facts, and which induce him to act upon that belief."

It is also insisted by appellee that the taking of the notes for the balance of the amount due under the contract of date December 15, 1926, after deducting the cash payment, raises a presumption that they were accepted in satisfaction of the debt, and as the notes have never been surrendered they create a bar to the action.

The giving of a note by a debtor for a precedent debt will not be held to extinguish the debt in the absence of an agreement to that effect. Marer & Company accepted the notes as evidence of an indebtedness that was due to it from the Danville Hotel Company but the record is silent as to any express agreement that the notes were to be accepted as an absolute payment of the indebtedness. *Keller v. North American Ins. Co.*, 301 Ill. 198; *Weger v. Robinson Nash Motor Co.*, 340 Ill. 81. We are of opinion that Marer & Company is not barred from maintaining this action because it accepted the notes for the balance due under the contract.

The judgment of the circuit court of Vermilion county is reversed and the cause remanded to that court with directions to allow the claim of appellant.

Reversed and remanded with directions.

(Seventeen pages in original opinion.)

Abstract.
Opinion filed July 17, 1934.
Circuit Court, 17, 1934.

302

58 7

PUBLISHED IN ABSTRACT

People of the State of Illinois, ex rel., Edward J.
Barrett, Auditor of Public Accounts of Said State,
v. Liberty State Bank of Bloomington, Illinois.

In re Petition No. 2.

William L. O'Connell, Receiver of the Liberty State
Bank, Petitioner, Appellee, v. Will F. Costigan,
R. M. O'Connell, Thomas S. Weldon, L. F.
Wellmerling, Mayor of the City of Bloomington,
John A. Cleary, Comptroller of the City of
Bloomington, Defendants-Appellees, City
of Bloomington, Defendant-Appellant.

Appeal from the Circuit Court of McLean County.

OCTOBER TERM, A. D. 1934.

281 I.A. 615⁴

Gen. No. 8845

Agenda No. 11

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is an appeal from a decree of the circuit court of McLean county ordering the city of Bloomington and John A. Cleary, Comptroller of said city, to surrender and deliver over to William L. O'Connell, Receiver of the Liberty State Bank, of Bloomington, Illinois, certain assets of said bank of the aggregate value of \$130,941.69, which had been withdrawn and taken from said bank and segregated in pursuance to an agreement entered into between the city of Bloomington and the Liberty State Bank for the purpose of securing funds of the city of Bloomington on deposit in said bank, and which assets the court found were assets of such receivership.

It appears that the Liberty State Bank, of Bloomington, acted as depository of the public funds of the city of Bloomington and paid interest on such deposits to the city. The bank had furnished it a depository bond, which would expire on May 22, 1931. A new bond was required, which the bank was unable to pro-

cure, and the bank being of opinion that it had authority to pledge its assets to protect the deposits of the city the board of directors authorized its president and cashier to pledge a part of its assets to protect such deposit. A contract was entered into between the city of Bloomington and the Liberty State Bank whereby it was agreed, in order to protect and secure the funds of the city then on deposit and thereafter on deposit in said bank from any loss, that the bank would deposit in a safety deposit box in the First National Bank and Trust Company, of Bloomington, securities and notes secured by first mortgages on Bloomington, Illinois, real estate of the market value of \$250,000.00. In keeping with agreement the securities in controversy were deposited.

The court entered a decree finding that the contract and pledge made pursuant to the terms thereof were invalid and void, and that the assets in question be delivered to William L. O'Connell, Receiver of the Liberty State Bank, upon demand.

It is insisted by appellant that a bank has power to pledge its assets to secure a deposit, and that such transaction is not unusual, and also that, if the contract and pledge should be held to be *ultra vires*, the receiver is not entitled to the assets except on condition that he shall first pay appellant the amount of its deposits.

These are the only questions presented for the determination of the court, and both have been decided adversely to appellant by our Supreme Court in the case of *The People of the State of Illinois, ex rel Oscar Nelson, Auditor of Public Accounts of said State, Adolph S. Helquist, receiver, appellee, v. Wiersema Park District, appellant*, No. 22673, in an opinion by Justice Jones at the June Term, A. D. 1935 of said court.

It is therefore ordered that the decree of the circuit court of McLean county be affirmed.

Affirmed.

(Three pages in original opinion.)

597
\$1.80
PUBLISHED IN ABSTRACT

Robert D. McKown, Appellee, v. The Alton Railroad
Company, a Corporation, Appellant.

Appeal from Circuit Court of Logan County.

APRIL TERM, A. D. 1935.

281 I.A. 616¹

Gen. No. 8902

Agenda No. 13

MR. JUSTICE DAVIS delivered the opinion of the Court.
The plaintiff filed his complaint in the circuit court of Logan county, seeking to recover a judgment against The Alton Railroad Company for damages sustained by him on account of alleged negligence of said defendant.

On February 8, 1934, the plaintiff left his home in Atlanta, Illinois, about 5:00 o'clock in the evening, and started alone in his car to Pontiac to attend a rehearsal of a dance orchestra in which he was employed, driving north on U. S. Route 66.

The right of way of The Alton Railroad Company extended in a northeasterly and southwesterly direction through the city of Pontiac, upon which were two main tracks. U. S. Route 66 ran parallel to the railroad tracks through Pontiac and at a distance of one block west of the railroad. The Alton depot was located on the east side of the northbound track of the railroad and one block east of said Route 66. On the north side of the railroad depot a street, known as Madison street and also referred to as Mason street, extended east and west. It was paved with concrete from Route 66 to the railroad right of way, and from the right of way of the railroad was a brick pavement thirty feet wide extending on through the business section of the city of Pontiac.

One block north of Madison street was Howard street, which also connected with Route 66, and ran east on the north edge of the business portion and was known as State Route 116. At Madison street crossing there were no automatic gates or wigwag system or watchman installed. This crossing was smooth, with concrete between the southbound and the northbound main tracks, and there were two street lights burning

at this street crossing, one on each side of the tracks. West of the tracks and on the north side of the street there was a garage, located by various witnesses at a distance of 20 to 75 feet from the west rail of the track.

On the night in question a freight train consisting of eighty-eight cars pulled into Pontiac on the easterly, or northbound track. This train was too long to take the siding at that station in order to make way for a northbound passenger train that was due about 7:00 o'clock. There was a crossover track between the northbound and southbound tracks, located between the north line of Madison street and the south line of Howard street. The freight train ran north of the north end of the crossover track so as to be in a position to back down through the crossover onto the southbound main track in order to allow the passenger train to proceed.

The plaintiff reached Pontiac about 7:00 o'clock and turned east off of Route 66 onto Madison street. Just as he was driving across the tracks the freight train which was backing south struck his car and pushed it along the track for a distance of about fifty feet and turned it over and dragged it under the caboose and completely wrecked it. The plaintiff was bruised and scratched but did not sustain any serious injury.

The amended complaint filed May 26, 1934, contains several counts. Count 4 charges general negligence. Count 5 charges negligence because defendant failed to maintain any gates, bars, or barriers across or adjacent to said crossing. Count 6 charges negligence for failure to maintain a watchman at said crossing. Count 7 charges negligence for failure to install, maintain, operate and use wigwag signals or alarm bells or warning device, to give warning to persons traveling toward said crossing. Count 8 charges that the defendant in the night time negligently ran and operated its train of cars backward upon and across said crossing at a dangerous rate of speed without any sufficient signal light or warning upon the rear of said train and without maintaining or operating any air whistle, bell, whistle, light, or other signal upon or adjacent to said car. Count 9 charges negligence in running said train in excess of ten miles per hour in violation of an ordinance of said city of Pontiac. This charge of negligence was withdrawn by plaintiff.

The original complaint was filed in said cause on April 19, 1934, and on May 18, 1934, the defendant filed a motion to require the plaintiff to amend his complaint by making it conform to sections 31 and 33 of the Civil Practice Act. This motion was never passed upon by the court and on May 26, 1934, the plaintiff filed an amended complaint in said cause, and no order was entered by the court fixing a time within which the defendant was required to answer said amended complaint.

On October 23, 1934, the day the case was called for trial, the defendant filed its answer denying all the charges of negligence contained in the amended complaint, and in connection therewith filed its counterclaim in which it claimed damages in the sum of \$100.00, money expended by it in rerailing and repairing its caboose, the derailing and damage to the same having been caused by the negligence of the plaintiff in the operation of his automobile at the time and place mentioned in his complaint.

On this same day and after having filed its answer and counterclaim it filed its motion for judgment against plaintiff for the reason that the complaint was insufficient in law, and moved the court to dismiss counts 5, 6 and 7 of said complaint for the reason that said counts failed to aver that there was any law or ordinance requiring the maintenance of gates or bars or requiring a watchman at said crossing or requiring the maintenance of warning devices. The court denied said motion of defendant because the same was not presented in apt time.

In this connection the court stated, and incorporated into the record, in substance: After the case was called for trial on October 23, 1934, and after the jury had been called into the jury box, the defendant presented to the court said motion to dismiss and to strike. This motion was presented about the hour of 9:30 o'clock in the morning on October 23, 1934. The court denied the motion on the sole ground that it had not been presented or filed in apt time.

Following the denial of the motion of the defendant to dismiss the said counts of the complaint the plaintiff moved the court to strike the counterclaim of the defendant because the same was not filed in apt time and thereupon the court sustained said motion and the counterclaim was by order of the court stricken.

On the trial of said cause before a jury the plaintiff recovered a verdict in the sum of \$400.00, upon which the court rendered judgment and from which judgment this appeal was perfected.

It is contended by appellant that as to the counts which respectively charge failure to maintain gates and barriers at the crossing, and failure to install and maintain a wigwag system and failure to maintain a watchman at the crossing to guard it, there was no evidence to sustain any of the charges; that it was not shown that there was any statute or ordinance requiring the defendant to maintain gates, or barriers, or to install a wigwag system, or to maintain a watchman at this crossing; that there is absolutely no allegation in the complaint which would give rise to any duty in this respect and no right of recovery is shown under such counts; that the negligence properly charged and before the jury consists of the general negligence charge and the charge that it operated its train without having a light upon the rear end of the caboose or without having any brakeman or other servant of the defendant upon said car as it approached said crossing to give warning of the approach of said train, and without using, maintaining or operating safety devices as charged in count 8 of the amended complaint.

The court in its instructions informed the jury that the plaintiff brought suit against the defendant to recover damages, and that for grounds of complaint it is alleged, that the defendant railroad passed over Madison street in the city of Pontiac, and that the plaintiff on February 8, 1934, in the exercise of due care for his safety and for the safety of his automobile, was traveling on Madison street toward and across said railroad crossing, and while he was so driving the defendant carelessly and negligently caused one of its trains to run backward and run across Madison street in the night time, and that by reason thereof the rear car of said train came into collision with the automobile in which plaintiff was traveling. And it is further alleged that the defendant, in the night time and after dark, while plaintiff was traveling on Madison street across said railroad crossing negligently ran and operated its train backward over said crossing at a high and dangerous rate of speed without having any sufficient signal lights or warning upon the rear of said train and without having any brakeman upon

defendant's car to give warning of the approach of said train and without using, maintaining or operating any whistle, bell, light, or other signal, while the same was being backed across said railroad crossing. And it is further alleged, that the defendant at the time in question and prior thereto carelessly and negligently failed to install, maintain, operate and use any wigwag or alarm bells or warning device to give warning of the approach of said train to persons traveling toward and across said crossing.

The court by its instructions limited the charges of negligence, which the jury might consider in arriving at their verdict, to the three counts mentioned in the instructions, counts 4, 7 and 8, and eliminated from the consideration of the jury the charges contained in the other counts, to-wit: the counts charging that it was negligent because it failed to maintain any gates, bars, or barriers across or adjacent to said crossing, and because it failed to maintain a watchman at said crossing.

Count 7, charging that defendant negligently failed to install and use any wigwag or alarm bells or warning device to give warning of the approach of said train to persons traveling toward said crossing, contained no allegation that there was any statute or ordinance of the city of Pontiac requiring the defendant to install and use any such devices to give warning of the approach of trains, nor allegations of circumstances or conditions creating special dangers that might require the defendant to install and use any such devices, neither is there proof in the record of any such circumstances or conditions. Under the allegations of said count the defendant was under no obligation to install and use any of the devices mentioned in said count at said crossing in order that persons approaching the same might be given warning of the approach of trains.

The court by its instructions having eliminated counts 5 and 6 and the defendant not being required under the allegations contained in count 7 to install and use any warning signals mentioned in said count there would remain for the consideration of the jury only the charges of negligence contained in counts 4 and 8 of the complaint as contended for by appellant.

It is contended that the trial court should have directed a verdict in favor of the defendant, and that

the judgment should be reversed with a finding of fact both on the ground that negligence on the part of the defendant is not shown as well as upon the ground of the evidence showing contributory negligence. That if the court be of a contrary opinion it is contended that the verdict is manifestly against the weight of the evidence, and that the judgment should be reversed upon that ground.

The evidence discloses that at the time of the accident it was dark, that the temperature was below zero, there was considerable wind. On the north side of Madison street and west of the railroad is a large garage building, located from 40 to 75 feet from the tracks, and west of this garage is a couple of vacant lots, and adjoining the lots is Pritt's store building. Between the railroad and the garage is a street wide enough for two cars to pass, which immediately adjoins the railroad. There were two street lights burning, one on each side of the railroad tracks. The crossing was smooth, there was concrete between the two main tracks, with steel rails flush with the other rails between the rails of each main track.

The plaintiff testified that he slowed up for the railroad tracks and looked north, when he was 25 feet west of the west track, and couldn't see anything there; that he looked north long enough that he thought he was sure that there was not anything there, and then looked south and saw the light of a train about a mile down the track, and took a few seconds to determine whether he had time enough to get across in front of the passenger train. He started on across the track and then looked north again, and just barely saw the train before it hit him; the caboose was not over 20 feet away from him when he first saw it, and he was directly on the track; the train was going towards the south with the caboose first; he did not see any one on the rear end of the caboose; there was no light that he observed; there was no sound of any kind made by any one in the vicinity of the caboose as it came down from the north; when he saw the caboose coming down the track towards him it all happened so quick he did not know exactly what he did; he did not recall how he got out of the car, but when he stood up Leonard Therian came over right at that time; just a few seconds after he got out one of the train crew came; he did not sustain any serious injuries of any kind; he was shook up quite a bit and received quite a few

bruises; it was quite a shock; he felt the effect of the bruises and scratches for two or three days; his car was a total wreck.

Leonard Therian testified that he lived one block north and in the middle of the block east of the crossing, and knew the plaintiff since the evening of the accident; when he passed over the track he saw a freight train that had stopped about 60 feet north of the crossing; he talked with the brakeman when he threw the switch of the northbound track; he went over to the store and he saw the car coming, and he knew that it was time for the train to back up and he sort of had a feeling there was going to be an accident, and he stopped and he heard a crash and went right over there then and the car went under the caboose and it must have broke the air hose under the caboose and stopped the train, and he turned around and he saw the plaintiff standing beside him. When he first saw the plaintiff's car he was between the garage building and the grocery store. The car was about 100 feet from the crossing, and seemed to be traveling about 20 or 25 miles an hour; when he saw the freight train standing north of the crossing the caboose was the nearest car to him; he did not observe any light upon the end of the caboose at that time, that he knew of; did not hear any air whistle or signal; he did not remember any one being around the rear end of the caboose, either before or after the accident; he was at the side of the wreckage talking to the plaintiff when a brakeman came back from the depot; there was no flagman at the crossing that night that he seen, when he was crossing; he did not see the caboose in motion after it started and before it struck the plaintiff's car; he was about 85 feet away when the collision occurred; the crossing was flat, and there were lights on each side of the track.

A. L. Orr testified, that he lived at 708 West Howard street and remembered the accident in question; he was going over to Pritt's store on Madison street, half a block west from the Alton tracks on the north side of the street to get some change; it was awfully cold; he came out of the store and started back east and saw a car going along, and then all at once he heard a crash and ran over, and by that time Therian was there; he saw a car smashed to pieces under the caboose; he did not see the freight train going across

the street at any time before the accident; when he last saw the train before the accident the caboose was backing up on the southbound track; it was just at the edge of the crossing; he just saw it about the time it hit the car; he did not hear any bell or whistle or see any man with any light; he did not see any light upon the caboose or the rear end of the train; he was west of the caboose; he did not see any man on the rear of the caboose or at the intersection; it hit the car about the middle of Madison street, or a little bit south; he was about 80 feet away when he hit the car.

H. C. Baldwin testified for the defendant, that he was agent of the Railway Express Agency; that on February 8, 1934, he was waiting for the passenger train in the transaction of his business and saw the freight train pass; he was at the point of the accident possibly two minutes after it occurred; both lights were burning at the crossing; he remained there possibly two or three minutes and then went back to the depot; he did not see the witnesses, Therian or Orr, there at the scene of the accident that night.

W. Calhoun testified for the defendant, that he was flagman for the train in question; just prior to the collision the freight train was backing up and he was on the rear end of the caboose, which was the last car of the train; at a point 30 or 40 feet before the train arrived at the crossing he was on the top step; he had an electric lantern, and was blowing the whistle; the train was backing over the crossing, and when it got within 25 or 30 feet of the crossing he saw a car turn off of Route 66 and he continued to blow the whistle until he saw the car was not going to stop, and he got down on the bottom step swinging his lantern across the hardroad and saw that he was not going to stop and got back up onto the caboose; the train was moving about three or four miles an hour; on the rear end of the caboose, just before and after the accident, there were two red markers burning and there was a red light hanging on the rear end of the caboose; the marker lights were showing red lights to the rear and the green lights to the side and front; he saw the plaintiff immediately after the accident; he went up to the depot and told the operator and came back, and plaintiff was standing there and said: "Nobody in there but me, I aint hurt any."

Charles A. Paulton testified, that he was the conductor on the defendant's train and was at Reynold's

street crossing at the time the accident occurred; he had sent the flagman at Bloomington to be ready to head in, and he hopped off at Reynold's street crossing to flag the passenger; while he was there he looked north and could see the freight train upon which he was conductor while it was near the station in Pontiac; he could see the markers on the rear of the freight train, and he walked north to the scene of the accident, and when he got there he saw the markers were lit and there was a red lantern hanging.

Edwin Erickson testified, he was the engineer on the freight train that night and had moved forward to get to the crossover and was backing up when they stopped me; the air set the brakes on the rear end and stopped me suddenly, and that is all I know; my train was moving very slowly, about two or three miles an hour in my judgment just prior to the time the emergency air brake was set; the automatic bell was ringing that night on the engine, and when he got the signal to back up he gave three blasts of the whistle.

Charles Chapman testified, that he was the fireman on the locomotive that night, and just prior to the accident the freight train was backing up when the brakes were applied suddenly; the train was moving at two or three miles an hour and the automatic bell was ringing and the engineer whistled three long blasts of the whistle before we started to back up.

Larry Bradshaw testified that he remembered the collision, he was familiar with the crossing and that there were electric lights on each side of the crossing; just prior to the accident he was standing in the window at the men's waiting room of the depot, on the north side; he had seen the freight train going north on the northbound main; after the train passed he noticed two markers or two lights burning; after the accident he went to the Madison street crossing with the brakeman; I saw the plaintiff and was around the scene of the accident until 10:00 o'clock; I did not see either Leonard Therian or A. L. Orr there.

Gordon Hodgson testified, that he lived in Pontiac and was a shoemaker and remembered the collision in question; he was at Washington street just a block south of Madison street when the accident occurred; he was east of the tracks on the depot platform; the station is between Washington and Madison streets; he was just south of the passenger station on the plat-

form and walked north towards Madison street and saw a freight coming down; could not say just where it was, but heard it coming and heard a whistle blow, and he hunched up his shoulders and kept walking, and then heard a crash; he seen a brakeman on the back and swinging his light; he was swinging it parallel with the railroad track up and down the track; I first seen him when he started across the crossing, he was just starting over Madison street crossing; as I looked towards the rear end of the caboose I could see him swinging his lantern and the two red lights up high; as the brakeman went to the passenger station he had a lantern in his hand; I was at the place of the accident about 20 minutes, and during that period I did not see either Therian or Orr.

Nelson Shank testified for the defendant, that he resided in Pontiac and remembered the collision; that there were two street lights near the crossing, one on each side of the track; that he was at the crossing shortly after the accident; that he saw a freight train there that night while he was in the depot and noticed the rear end of it; noticed red lights lit on the rear end of the caboose; after the accident he was out at the scene of it and noticed the caboose and the rear end of the caboose was up in the air and the automobile underneath it, and the caboose had red lights on the back of it; just prior to the accident I was in the northwest part of the depot waiting room; this waiting room was about 150 feet south of the crossing and on the east side of the tracks; I saw this freight train as it went by the depot; just before the accident I heard them blow a whistle, it was an air whistle; I heard it several times; I heard a crash, but did not know it was the collision at the time; a brakeman came inside and returned to the crossing right away; I went up to the crossing about two minutes after the brakeman came inside; a few fellows went ahead of me; I stood around there maybe five minutes and did not see either Therian or Orr. The foregoing is the substance of the evidence of the witnesses who testified to the occurrence at the time of the accident.

There is a direct conflict in the testimony touching almost every material fact in the case; but the jury found the issues in favor of the plaintiff, and that implies a finding of every fact necessary to sustain the action, among which is the operating of the train backwards over this crossing in the night time without

1. The first part of the paper discusses the importance of the study of the history of the English language. It is noted that the English language has a long and rich history, and that the study of its development is essential for a full understanding of the language.

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having any sufficient signal light or warning upon the rear of said train and without having any brakeman or other servant upon said car to maintain a lookout and give warning of its approach or without maintaining or operating any whistle, bell or other signal upon or adjacent to said car. It is the province of the jury to pass upon the facts and to judge of the credibility of the witnesses and the weight to be given their testimony.

After a careful consideration of all the evidence in the record we cannot say that the verdict is manifestly against the weight of the evidence and are therefore not disposed to disturb the verdict of the jury because negligence on the part of the defendant was not proven, or because the plaintiff was guilty of contributory negligence as contended for by defendant. While the uncontradicted evidence discloses that the train was moving slowly and that the bell on the engine was ringing and the engineer gave three blasts of the whistle before moving the train, this did not give the plaintiff a reasonable warning of the approach of the train, since it contained 88 cars and was nearly a mile in length and was being backed up across a crossing in the night time, when there was a strong wind blowing and the temperature below zero and when it would be reasonably expected that any driver of a car would have the windows closed to protect himself from the cold.

Complaint is made by the defendant because upon cross-examination of one of its witnesses a question was asked by plaintiff's attorney as to the testimony of the witness on direct examination, to which question the attorney for defendant objected and stated, "He didn't say that;" and then objected to another question, and the court said, "Let the record speak, what does it say?" And the reporter proceeded to read from his notes, and defendant objected to the reading of so much of the record over again in the presence of the jury, and the court replied, "The court asked the reporter to read to verify the record, to find out what the witness said." The attorney for the defendant said he objected to its being read in the presence of the jury, to which the court said: "You don't want the jury to hear it?" It is not good practice to read the testimony of witnesses from the record in the presence of the jury as it might tend to emphasize such evidence, and the remark made by the

court was out of place and might have a tendency to prejudice the jury against the defendant. No prejudicial error was committed by the court in making such remark.

Objection is also made to the amount of the verdict. The evidence discloses that the automobile of the plaintiff was a second-hand car, which he had purchased for about \$52.00, and upon which he had made some repairs and, with the repairs, he had invested in the car something like \$200.00. He was entitled to recover the full cash value of the car at that time. The damage awarded by the jury were not only for the value of the car but also included damages to the person of the plaintiff, and while the plaintiff did not sustain any serious injuries he was bruised and shaken up and felt the effects of it for two or three days. We do not think the amount of the verdict was excessive considering the damages sustained as shown by the evidence.

The defendant also complains because the court on motion of the plaintiff struck from the files its counterclaim. The answer and counterclaim was filed by the defendant the day the case was called for trial. After the plaintiff filed his amended complaint no order of court was sought requiring the defendant to answer. No motion was made by the plaintiff to strike the answer, but if the counterclaim could be stricken because not filed in ample time, the same rule would apply to the answer. The counterclaim of the defendant should not have been stricken, but we are of opinion that under the facts of the case the error was harmless. The counterclaim grew out of the same accident and was a claim on the part of the defendant that the plaintiff was negligent and caused damage to the defendant, and on this issue the defendant would have the burden of the proof. The jury found that the plaintiff was not guilty of negligence.

At the close of the evidence the plaintiff and the defendant submitted to the court in writing suggestions as to instructions to be given to the jury. Thereupon the court presented plaintiff and defendant with the instructions proposed to be given by the court. The defendant then said: Defendant renews its objections heretofore made to the proffered instructions of plaintiff, and also makes objection because the court has not included in his instructions to be given the instructions suggestions heretofore, and which were not adopted.

Defendant also objects to the modification of defendant's suggested instructions, such of them as were modified by the court.

Under Section 67 of the Civil Practice Act all objections and suggestions to the instructions proposed to be given to the jury by the court must be specific, and only such suggestions as are not adopted and all objections that are overruled may be made a ground of review. No specific objections were made by the defendant to any of the instructions proposed to be given by the court, and for that reason only such suggestions made by the defendant as were not adopted and are now called to the attention of the court can be made a ground for review.

It is insisted by the defendant that the court erred in refusing to give its suggested and requested instruction informing the jury that under the facts and circumstances in evidence there was no duty on the part of The Alton Railroad Company to install, maintain, operate or use any wigwag signal or alarm bells or warning devices at the crossing in question; and the failure, if any, of the defendant railroad company so to do was not negligence on the part of said railroad company. The court might well have given this instruction as count 7 of the complaint, which charges the negligence referred to in said suggested and requested instruction, did not state a good cause of action. However, the court did not give any instruction directing a verdict based upon the allegations contained in said count, and although the court permitted that count to go to the jury it was not reversible error to permit said count to go to the jury or to refuse said instruction, as one good count supported by the evidence will sustain a verdict and judgment although the other counts in the complaint may be defective (Civ. Prac. Act, Sec. 68, Par. (2)). The defendant admits that the fourth and eight counts of the complaint state a good cause of action although denying that they are supported by the evidence.

The defendant complains of an instruction which is designated as commencing with the second paragraph on page 78 of the abstract of record, which defines "ordinary care." We find no specific objection made to this instruction, and for that reason can not consider it. Instructions which are proposed to be given by the court should be numbered, before they are submitted to the attorneys for objections and suggestions,

so that they may be specifically pointed out when objections are made, and they should also be preserved in the record.

It is insisted by the defendant that the court erroneously refused to give to the jury the last seven lines of a suggested instruction which read as follows: "Neither the plaintiff nor the defendant was required to exercise an extraordinary degree of care on the occasion in question; all that was required of either was the exercise of ordinary care. Ordinary care as used in these instructions is such care as a person of ordinary prudence would exercise under the same or like circumstances; and the prudence and diligence which the law requires a person to exercise for his own safety must be proportionate to the danger, if any, known to him or ascertainable by the exercise of ordinary care and exercised with reference to the situation and position which such person is about to take or in which such person finds himself." The omitted part commencing with the words "and the prudence and diligence, etc." This instruction, after first informing the jury as to the degree of care required to be exercised by the plaintiff and defendant alike, then tells the jury of the prudence and diligence which the law requires the plaintiff to exercise for his own safety, without informing them as to the prudence and diligence which the law requires the defendant to exercise for the safety of others in the movement of its train, from which the jury could infer that plaintiff was required to exercise greater care for his own safety than the defendant was required to exercise for the safety of others. The court properly refused to incorporate the seven lines in the given instruction.

Complaint is also made because the court omitted to give the last suggested instruction on page 80 of the abstract. This instruction was incorporated in others given. Objection is also made to an instruction at the top of page 81 because the court eliminated the words "the burden of proof is not upon the defendant but upon the plaintiff." The balance of the instruction started out by telling the jury that: "Before plaintiff can recover * * * he must prove by a preponderance of the evidence, etc." The court properly struck out the words above referred to, as in the way they were used and connected up with the balance of the instruction they were argumentative. Defendant also complains because the court omitted the words,

"the character of his testimony—whether negative or affirmative—of any facts," in the instruction at the bottom of page 82 and in which the jury were informed as to what might be taken into consideration in weighing the evidence of the witnesses. There was no error in refusing to incorporate these words.

An instruction of the character of this one in question can only be offered when so worded that it does not single out the witnesses from one side or the other, so that it might apply to any witness in the case without reference to whether he was called by the plaintiff or by the defendant. It is for the jury to say, under all the facts and the circumstances in evidence, what weight shall be given to the testimony of the witnesses. It is never the province of the court to tell the jury which class of conflicting testimony is entitled to the greater weight. *West Chgo. St. R. R. Co. v. Mueller*, 165 Ill. 499. It was not error to refuse to incorporate the suggested instructions at the top of page 83 and at the bottom of that page into the instruction given to the jury.

Complaint is also made because the instructions on pages 84 and 85 were not incorporated in the instructions given, but it is admitted that they were covered by given instructions. It is neither necessary nor proper to emphasize given instructions by repeating them.

After having given careful consideration to the errors relied upon for reversal we find no prejudicial error in the record and the judgment of the circuit court is therefore affirmed.

Affirmed.

(Eighteen pages in original opinion.)



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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

No 5

May Term, 1935.

Agenda 10.

281 I.A. 616²

Marvel Golliday,

Appellee,

vs.

City of Alton, a Municipal
Corporation,

Appellant.

}
Appeal from City Court of Alton.

EDWARDS, P. J.

Plaintiff sued for and recovered a verdict and judgment in the sum of \$500 against defendant, City of Alton, for injuries alleged to have been sustained by her on the evening of September 8, 1932, by falling into a catch basin opening upon one of the public streets of said city. Defendant, to reverse the judgment, assigns four principal grounds: That the proof does not show due care on the part of plaintiff; that it does not show defendant guilty of any actionable negligence; that the injury sustained was the result of a mere accident, and that the damages awarded were excessive.

We have examined the testimony with care, and are constrained to say that whether plaintiff exercised due care for her own safety, whether

the proof shows that the defendant was guilty of actionable negligence, and whether the injury was the result of a mere accident, were all questions of fact, which were fairly raised by the evidence, and hence were proper subjects for the jury's determination. The finding of the jury is binding upon this court unless we are convinced that the verdict is contrary to the manifest weight of the evidence.

There is proof which reasonably tends to support the contention of plaintiff that she was at the time of and just prior to the accident in the exercise of due care for her own safety, and also that the defendant was guilty of negligence which was the proximate cause of the accident and resultant injury; for which reason we cannot say that the verdict is against the manifest weight of the evidence. Therefore, if the jury were warranted in finding defendant guilty of actionable negligence, it follows as a necessary consequence that they could not find the injury resulted from a mere accident.

As to the amount of damages awarded, it appears that plaintiff, as a result of the injury, was unemployed for a period of ten or eleven months; that she thereby lost her weekly wages of \$11, and that she paid or became liable for doctor's and hospital bills amounting to about \$265.

Defendant contends that there is no sufficient proof that an appendicitis operation, which plaintiff underwent on November 5 following the accident, was attributable to an injury resulting therefrom. The proof shows that following such occurrence plaintiff had symptoms of appendicitis, and that prior thereto she did not have them. Her physician testified that appendicitis might be occasioned by such an accident, though he also stated that it might have been caused by many other conditions. Whether the accident was the procuring cause of her appendicitis, in view of the fact that

after the accident she showed symptoms of such malady which had not existed before such time, was a question of fact, and properly submitted to the jury.

Independent of this element of damages, however, the undisputed proof shows that plaintiff lost about eleven months of employment, at \$44 per month, or a total of \$484. Adding the sum of \$22 charged by the physician for treating plaintiff prior to the operation, would make the uncontradicted actual damage sustained, exceed \$500, the amount of the verdict.

Upon a consideration of the record we find no ground for disturbing the judgment, and it will be affirmed.

Judgment affirmed.

Not to be published in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1935.

Term No. 7

Agenda No. 12

NATHAN MATHES,
Plaintiff-Appellee,

vs.

M. D. POWELL and JEFFERSON
S. BUSH,
Defendants.

(M. D. POWELL, Appellant.)

281 I.A. 616³

APPEAL FROM THE
CIRCUIT COURT,
MADISON COUNTY.

Murphy, J:

Defendant Bush sued plaintiff Mathes for malicious prosecution and recovered a judgment of \$1000. Mathes appealed to this court where the judgment was reversed without remanding. Bush then applied to this court for a certificate of importance which was granted and the case was appealed to the Supreme Court where the judgment of this court was affirmed. In granting the certificate of importance, this court required Bush to give a bond in the sum of \$200. Bush furnished the bond with appellant Powell as surety. The instant suit is brought by Mathes, appellee, against Bush and Powell and is based upon the bond given by Bush and Powell and filed in this court upon the granting of the certificate of importance. The condition of the bond is that Bush shall pay the amount of any judgment, cost, interest or damages rendered or to be rendered against him by the Supreme Court. This case was tried in the circuit court upon an appeal from a justice

of peace. The facts were stipulated and in the fourth paragraph of said stipulation it is stated: "that all costs incurred in said appeal from the appellate court to the Supreme Court had been fully paid but that the costs incurred by the appeal from the circuit court to the appellate court have not been paid and that Mathes has paid out on account of such costs, the following sums:

| | |
|--|-----------------|
| Bill of Exceptions from Circuit Court..... | \$40.00 |
| Circuit Court Common Law Record..... | 12.00 |
| Abstract..... | 42.20 |
| Filing Fee in Appellate Court..... | 20.00 |
| Appellee Filing Fee in Supreme Court..... | 10.00 |
| Total..... | <u>\$124.20</u> |

Judgment was entered against Bush and Powell and Powell alone perfected this appeal.

Appellant's obligation was to pay the costs rendered against Bush by the Supreme Court and by the stipulation it appears that all such costs incurred in said appeal from the appellate court to the Supreme Court have been fully paid. This discharged appellant's obligation on the bond and the court erred in entering judgment against him. He was not liable on the bond for costs taxed in the circuit court or on appeal from the circuit court to the appellate court.

The judgment of the circuit court is reversed as to appellant Powell.

Judgment reversed.

not to be published in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

~~DAY~~ TERM, A. D. ~~1933~~

Oct

1934

Term No. 10

Agenda No. 3

H. E. SEATON and CLARA M. SEATON,
(Plaintiffs) Appellees,

vs.

UNITED STATES FIRE INSURANCE
COMPANY OF NEW YORK,
(Defendant) Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
FAYETTE COUNTY.

281 I.A. 616⁴

Murphy, J:

Appellees instituted this suit to recover for a fire loss under a fire insurance policy issued by appellants covering property in which appellees had an interest.

The declaration contained three counts and the common counts. The first point urged as grounds for reversal is that the court erred in not granting its motion for a directed verdict. One of the points raised under that motion is that appellees did not make proof of notice as required by the policy or by appellees' pleadings. The policy provision was that "In case of loss the insured shall, within fifteen days, give this Company written notice thereof, and shall, within sixty days from date of the loss, render to the Company a particular account of such loss".

The allegations of the several counts which are material for a consideration of this point are as follows: the first count, "And the plaintiffs further aver that forthwith after the happening of the said fire (which was November 3, 1932) and loss and damage to wit on the 23rd day of November, 1933, they gave notice thereof to the defendants agent and delivered to the

defendant through its agent a particular account of the said loss and damages as the nature of the case would admit; which said account was signed by the plaintiffs and delivered to the adjuster of the said company which said account was signed by the plaintiffs and accompanied by their oath, etc., and by another allegation it is alleged generally that they kept and performed all the things in the said policy contained on their part to be kept and performed. The second count is the same as the first count except it is alleged that they gave written notice of the fire to the defendant as soon thereafter as possible and the third count avers that they gave notice in writing within twenty days after the fire.

The defendant pleaded the general issue to these allegations.

The evidence is that appellees gave Ben Allen, who was the broker who solicited the insurance, verbal notice of the loss. It may be the company waived the requirement of a written notice as required by the provision of the policy but on this we are not now concerned. None of the counts averred a waiver of compliance of the policy provisions by the company. Each averred a compliance and to make their case, it was incumbent upon plaintiff to sustain the allegations of their declaration by proof.

In *Feder v. Midland Casualty Co.*, 316 Ill. 552, on page 558, the court said, "The appellant contends that there was a waiver of requirement of proofs of loss by Nitz's statement that the company refused to pay because the premium had not been paid. If the company had refused to pay because the premium had not been paid it might be contended with great force that such refusal was a waiver of the requirement of the policy that proofs of loss should be furnished; that the company having placed its defense on one proposition waived all others. The appellant by the pleadings.

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In *Feder v. Midland Casualty Co.*, 316 Ill. 552, on page 558, the court said, "The appellant contends that there was a waiver of requirement of proofs of loss by Nitz's statement that the company refused to pay because the premium had not been paid. If the company had refused to pay because the premium had not been paid it might be contended with great force that such refusal was a waiver of the requirement of the policy that proofs of loss should be furnished; that the company having placed its defense on one proposition waived all others. The appellant by the pleadings.

has not claimed the benefit of this waiver. The declaration has alleged a performance of the conditions and not a waiver of them; that she furnished the proofs--not that she was excused from furnishing them.

The object of a declaration in an action at law is to state the facts constituting the plaintiff's cause of action upon which he relies to recover, so as to enable the defendant to prepare his defense and meet the facts alleged with appropriate evidence. In order to recover the plaintiff must prove the case alleged in his declaration. It is a primary and elementary principle that a plaintiff can recover only on the case made in his declaration. He cannot make one case by his allegations and recover on a different case made by the proof. (Moss v. Johnson, 22 Ill. 633; Menifee v. Higgins, 57 id. 50; Wabash Western Railway Co. v. Friedman, 146 id. 583) The defendant has a right to know what the plaintiff charges against him in order to properly make his defense and to prevent his being taken by surprise by the evidence at the trial. (Wabash Railroad Co. v. Billings, 212 Ill. 37) It is a familiar principle of pleading that when the consideration of the defendant's contract is executory or its performance is to depend on some acts to be done or forbore by the plaintiff, or on some other event, the plaintiff must aver the fulfillment of the condition or show some excuse for the non-performance. 1 Chitty on Pleading, 320; People v. Glann, 70 Ill. 232."

In Hart v. Carsley Manf. Co., 221 Ill. 444, the court said, "Though an excuse for not performing a condition is for some purpose equivalent to performance, yet it is not the same thing and therefore in pleading, performance must never be averred by a party who relies upon an excuse for not performing, but he must state his excuse."

The policy was lost and on application of appellees a lost policy certificate was issued and delivered to appellees.

Appellees contend that this suit is on the lost policy certificate and since it did not contain the provision in reference to notice, it was not incumbent upon them to make proof in accordance with the policy provision. The lost policy certificate contained a provision that it was issued subject to the terms and conditions of the policy and made those terms a part by reference. We are of the opinion that this was sufficient to make the provision in the policy in reference to notice a part of the lost policy certificate.

Other points have been argued which involve a consideration of the evidence but since the case has to be reversed and remanded for another trial, we will not discuss those points.

Judgment of the lower court is reversed and cause remanded.

Reversed and remanded.

not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1935.

Term No. 12

Agenda No. 3

MILDRED SCHNOEKER,
Plaintiff-Appellant,

vs.

THE SERVICE MUTUAL BENEFIT
ASSOCIATION OF FAIRFIELD,
ILLINOIS, a Corporation,
Defendant-Appellee.

APPEAL FROM THE
COUNTY COURT OF
RANDOLPH COUNTY,
ILLINOIS.

281 I.A. 616⁵

Murphy, J:

Appellee is a Mutual Benefit Association organized under the laws of this State. February 21, 1931, it issued a certificate of membership with benefits to William Schnoeker in which appellant herein was named as beneficiary. The insured died October 22, 1933, and appellant brings this action to recover the benefits provided for in that membership certificate.

The complaint sets out in haec verba the certificate declared upon and alleges that the insured paid the assessments and performed the conditions to be kept by him as expressed in the policy. Defendant's answer admits the issuance of the policy, payment of the assessments and sets up as an affirmative defense that the insured at the time of the issuance of the certificate was more than seventy years of age and that the issuance of a certificate of membership to a person who was more than seventy years of age was prohibited by statute and therefore ultra vires. Appellant replied that even though the act of issuing the certificate was ultra vires the defendant knew the correct age of the member and having issued the certificate and accepted the

payment of assessments, it was estopped from pleading the defense of ultra vires.

The case was tried before the court without a jury and judgment was entered for appellee.

The evidence shows that appellee's agent solicited William Schnoecker for membership in appellee company; that he told the agent he was then more than seventy years of age and gave the agent the correct date of his birth, that the agent told him that they would insert in the application blank a date of birth by which he would be eligible for membership with benefits. Such date of birth was inserted and upon that application appellee issued the certificate sued upon. It does not appear that any of the officers of appellee company knew of the falsity of the statement as to the age of the insured.

Appellee was incorporated under the act which provides for the organization of mutual benefit associations on the assessment plan intended to benefit the widows, orphans, heirs and devisees of deceased members. Smith-Hurd Statutes 1935, Chap. 73, Section 505-534; Cahill's Statutes 1933, Chap. 73, Section 435, para. 1-30. Said act requires the incorporators of such a company to file with the Department of Trade and Commerce a written declaration stating, among other things, the maximum amount of benefits it is intended to pay, which shall not be in excess of the amounts specified in the act according to the classification of ages therein stated. The minimum age for which benefits may be paid is one year and the maximum age is seventy. Nowhere in the act is any provision made for paying benefits to any member who is more than seventy years of age. The application filed by the promoters with the Department of Trade and Commerce stated that it was their desire

to form a mutual benefit association according to said act and the certificate of the Director of Trade and Commerce granted permission to proceed in accordance with the provisions of said act. The power of appellee to transact business was derived solely from the statute under which it was organized and the certificate or permits issued by the Department of Trade and Commerce. *Rockhold v. Canton Masonic Mutual Benefit Society*, 129 Ill. 440; *National Union v. Keefe*, 263 Ill. 453. Appellee was without power to issue a membership certificate with benefits to a person who was over seventy years of age. The contract sued upon was ultra vires and therefore void. *Steele v. Fraternal Tribunes*, 215 Ill. 190; *Rockhold v. Canton Masonic Mutual Benefit Society*, supra; *Pattison v. Bankers Life Association*, 360 Ill. 616.

Section 18 of the act provides that no association organized under the act shall after the expiration of one year from the date of the certificate avail itself of any defense that it has by reason of any answer to interrogatories or statements made by the member in his application for membership. Appellant contends that under this section appellee is bound by the age stated in deceased's application and that it is barred from the defense of ultra vires. This section has reference to those certificates of membership issued by an association under and pursuant to the power given by statute and was not intended to cover certificates issued without statutory power. To give this section the construction contended for by appellant would be to hold that the legislature passed the act with limitation of power and in the same act made provision for the avoidance of such limitations. A construction that would lead to such an absurdity cannot be adopted.

Appellant contends that even though the issuance of the certificate of membership to the deceased be

held to be ultra vires, appellee, having accepted the payment of assessments and other benefits from him, is now estopped to plead ultra vires as a defense to appellant's claim.

The general rule is that a corporation may not avail itself of the defense of ultra vires when a contract has been in good faith performed by the other party and the corporation has received full benefit of that performance but that rule has no application where the contract is illegal, immoral, prohibited by statute or against public policy.

In Pattison v. Bankers Life Association, supra, the court said, "Whether a corporation is estopped to set up the defense of ultra vires depends upon whether the acts are beyond the purpose or powers of the corporation. If the power to make such a contract is entirely wanting there could be no power to ratify it, and such attempted contract could not be given vitality by the acts of parties under it".

Appellee had no power to issue the certificate of membership to a person over seventy years of age and is not ^{of} estopped from raising the defense ultra vires.

The judgment of the County Court of Randolph County is affirmed.

Judgment affirmed.

not to be published in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1935

Term No. 13

Agenda No. 15

EDWARD A. RUFF,
Appellant,

vs.

EGYPTIAN FOUNDRY AND MANU-
FACTURING COMPANY,
Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
ST. CLAIR, COUNTY.

281 I.A. 617'

Murphy, J:

Appellant, herein referred to as plaintiff, instituted his suit against appellee, a corporation, herein referred to as defendant, to recover the reasonable value of personal services alleged to have been furnished the defendant.

The suit was started in justice court and on appeal to the circuit court, it was tried without a jury and judgment was entered for the defendant. The errors relied upon for a reversal are that the judgment was against the weight of the evidence and that there was error in the court's ruling upon certain propositions of law submitted by both parties.

The evidence shows that the defendant was organized in January, 1930, and in August following began operations, conducting a foundry business. The capital stock was held by different persons, several of whom were employees of the defendant. The plaintiff was a stockholder and was elected secretary at the organization meeting in January, 1930, and continued in that official position until August 3, 1931.

The stockholders who performed manual labor in the factory were allowed regular union scale of wage for their services but in order to aid in the financing of the company, there was a general plan that such employed stockholders would be paid only a part of their earning, at the time their services were rendered, and the balance to be entered as a credit to such stockholder on the books of the company.

The defendant engaged in doing foundry work for other companies, some of which was on a cost plus basis, others by special arrangement where the employees of the company having the work done would do the work at defendant's factory. The number employed by defendant varied, the maximum at any time being about thirty-five. Some of the employees were paid on a price scale, others on an hourly basis.

The evidence discloses that the plaintiff was employed from the time of defendant's organization in January, 1930, to August 3, 1931. During the last year of that period, he devoted all his time to the services of the company. He kept the books, including the records of compensation due the various employees, called upon the companies or individuals who had employed the defendant and from them he secured certain data to keep his records and in some instances, collected accounts due the defendant.

The case, having originated in justice court, the pleadings were ore tenus but it appears that plaintiff sought to recover upon a quantum meruit. He had a right to select the theory upon which he wished to try his suit. His right to recover on a quantum meruit is supported by the opinion in Bloom v. Vehon Co., 341 Ill. 200, 207, wherein plaintiff sued a corporation to recover for services, the court said. "It is stated that defendant accepted services of plaintiff, which were of great benefit to

defendant, and that for that reason the judgment should be allowed to stand, even if the contract for services was void. The services rendered were of value to defendant, and on a proper state of the pleadings plaintiff could recover what they were reasonably worth under a quantum meruit."

Plaintiff introduced evidence as to the value of such services and offered in evidence the record of the minutes of the board of directors' meeting of the date of July 26 and August 3, 1931.

On July 16, 1931, the board of directors authorized an audit of the books and before the audit was completed and on July 26, the directors held a meeting at which time a record was made showing that plaintiff was entitled to a credit of \$538 for salary for the year 1930 and for the year 1931 up to July 26, plaintiff should receive a credit for three-fourths of the average earnings of the regularly employed stockholder from January 1 to March, 1931, and that the same be credited to plaintiff's account. The compensation for 1930 entered in a lump sum was computed on the same basis as the earnings for 1931; that is, three-fourths of the average earnings of regularly employed stockholders. Defendant raises a question as to the regularity of the meeting of July 26 to which we shall hereinafter refer. The auditor in making the audit of the books gave the plaintiff credit in his report for the amounts shown to have been allowed by the board at the July 26 meeting, less amounts paid to plaintiff by weekly check and three small items, which had been improperly charged to the company. The audit showed a balance due plaintiff of \$442.80. The value of the services as testified to by plaintiff was \$422.80. At the meeting on August 3, the auditor's report was before the board and was unanimously adopted. As we understand the record, the credit of plaintiff was included in the report at the time of passing the resolution accepting it.

Defendant offered evidence of William Arey, the president, who was an employee in the foundry and one other witness, also a stockholder, each of whom testified in substance that the plaintiff was to keep the books for \$10 a month. This was denied by plaintiff. Defendant also offered evidence to the effect that Arey did not receive a regular notice for the meeting of July 23 when the credits to plaintiff were authorized by the action of the board of directors.

The view we take of this record makes it unnecessary to consider the record of July 23 or the binding effect of it for the reason that at the meeting on August 3 the board of directors unanimously adopted the report of the auditor including the credits to plaintiff and even though the record would not be sufficient to sustain the action taken on July 23 yet the record of August 3 adopting the auditor's report including credit to plaintiff would be an admission of the corporation of its liability and be admissible against it in this suit.

We find that the evidence of the plaintiff together with the general scheme adopted for paying who were employed and the admission of liability and credits entered for the plaintiff as shown by the record of the defendant company overcomes the evidence of the defendant's witnesses that plaintiff was to render the services for Ten Dollars per month for the full period of time he was employed.

Defendant contends that inasmuch as plaintiff was secretary of the corporation he was not entitled to receive a salary unless the same was previously authorized by by-laws or by resolution of the board of directors. In Joy v. Ditto, 356 Ill. 348, the court said, "The rule that an officer or a director of a corporation cannot receive compensation unless such is pro-

vided by the by-laws or resolution of the board of directors before the services are rendered has an exception now as fully established as the rule (4 Fletcher's Ency. "Corporations," sec. 2739,) that where such officer or director has performed services clearly outside the scope of his duties as such officer or director, at the instance of someone of the corporation having general authority over its affairs and under a promise of payment for such services, he is entitled to receive pay therefor."

Defendant further contends that plaintiff cannot recover under the exceptions to the rule for the reason that the services rendered by plaintiff were not furnished at the instance of someone of the corporation having general authority over its affairs and under a promise of payment for such services. The testimony of Mr. Arey is that he had an understanding with Mr. Ruff about his services as bookkeeper keeping the record of the company, made on the first night of organization. This clearly established the fact that plaintiff was requested to furnish the services and the only controversy as shown by the evidence is as to the amount to be paid for such services.

What has been said in reference to the preponderance of the evidence and the minutes of the board of directors entered July 23 disposes of the questions raised by the assignment of errors on the rulings of the various propositions of law submitted.

Plaintiff asks for the reversal of the judgment of the lower court and the entry of a judgment in this court, the same to include interest from August 3, 1931.

Plaintiff tried this case in the circuit court and in this court on the theory that he was entitled to recover on a quantum meruit for the reasonable value of his services.

Such a theory involved questions of fact and opinions as to value so that it could not be said that it was a liquidated claim within the meaning of Sec. 2, Chap. 74, Cahill's Statutes; Smith-Hurd Sec. 2, Chap. 74.

The record of the minutes of the board of directors made August 3, 1931, has been offered by plaintiff as an admission against interest and not as furnishing a basis for a suit on an account stated.

The controverted questions of fact presented in the trial are such that it could not be said that plaintiff was entitled to interest by reason of vexatious and unreasonable delay. O'Heron, et al v. American Bridge Co., 177 Ill. App. 405.

The judgment of the lower court is reversed and it is ordered that the clerk of this court enter judgment in favor of the plaintiff and against the defendant for \$422.80, the amount the evidence shows to have been the fair and reasonable value of the services rendered.

Judgment of the lower court is reversed and judgment here.

not to be published in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1935

Term No. 17

Agenda No. 18

PEOPLE of the STATE of ILLINOIS,
Defendant in Error

vs.

OLIVER J. SCHMIDT and
MRS. OLIVER J. SCHMIDT,
Plaintiffs in Error.

ERROR TO THE COUNTY
COURT OF BOND COUNTY,
ILLINOIS.

281 I.A. 617²

Murphy, J:

The State's Attorney of Bond County filed an information in the county court of that county charging the plaintiffs in error with the violation of Chapter 91, Section 16 I, Smith-Hurd's Statutes; Chapter 91, Section 25, Cahill's Statutes, otherwise known as the Medical Practice Act. The information upon which the case was tried consisted of one count. Plaintiffs in error were tried by a jury and found guilty. After overruling a motion for a new trial and in arrest of judgment, judgment was entered on the verdict, assessing a fine of Two Hundred and Fifty Dollars against each of said plaintiffs in error.

The count of the information upon which the case was tried charged that plaintiffs in error did on a certain date in said county willfully and unlawfully, not then and there possessing in full force and virtue a valid and existing license issued by the authority of the State of Illinois to practice the treatment of human ailments in any manner, did hold themselves out to the public as being engaged in the diagnosis and treatment of human ailments by a certain method or system commonly known

and designated as Chiropractic, consisting of the passage of a certain instrument, the further description of which is unknown, upon and along the back and spinal areas of human beings, and certain manipulations with the hands upon said human beings, and by maintaining and occupying an office for that purpose in a certain building known and described as No. 212 East College avenue in the City of Greenville, County and State aforesaid; by placing or causing to be placed in or about the exterior of said building a certain large sign with the name Schmidt and Schmidt painted or written therein in large letters and in connection with the said name the title or word Chiropractors painted or written thereupon in large letters; by advertising the location of said office in a certain newspaper of general circulation to-wit; Greenville Advocate, published at said City of Greenville, County and State aforesaid, and by inviting and receiving at their said office sundry and divers~~d~~ members of the public to be by them examined and treated as aforesaid at said office for human ailments, or supposed human ailments, to-wit: Rheumatism, Neuritis, Hay Fever, Bronchitis Nervousness and divers~~d~~ other human ailments, or supposed human ailments, the further name or description of which is unknown, contrary to the Statute in such case made and provided and against the peace and dignity of the same People of the State of Illinois". The section of the statute for the violation of which this information was filed provides, "If any person shall hold himself out to the public as being engaged in the diagnosis or treatment of ailments of human beings; *** or shall maintain an office for examination or treatment of persons afflicted, or alleged or supposed to be afflicted, by any ailment; or shall attach the title Doctor, Physician, Surgeon, M. D., or any other

word or abbreviation to his name, indicative that he is engaged in the treatment of human ailments as a business; and shall not then possess in full force and virtue a valid license issued by the authority of this State to practice the treatment of human ailments in any manner, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than One Hundred Dollars nor more than Five Hundred Dollars, or by confinement in the County Jail not more than one year, or by both such fine and imprisonment, in the discretion of the Court".

The wording of the count is in the language of the statute, except in the statute the disjunctive "or" is used in connecting the several offenses therein stated, while in the count, the offenses are joined by the conjunction "and". Where a statute forbids several things in the alternative, it is usually construed as creating but a single offense and the indictment may charge the defendant with committing all the acts using the conjunction "and" where the statute uses the disjunctive "or". *Blemer v. The People*, 76 Ill. 265; *The People v. Reed*, 287 Ill. 606. In *The People v. Langguth, et al*, 347 Ill. 500, the court followed the rule announced in the foregoing cases and said "that when a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and is subject to the same punishment all or any of such acts may be charged conjunctively as constituting a single offense". The court did not err in overruling the motion to quash.

The second assignment of error argued is that plaintiffs in error could not know the charge or charges upon which the verdict of guilty was rendered and that the court erred in not requiring defendant in error to make an election of the charge upon which they would rely for conviction. The various

acts relied upon by the pleader as constituting the offense were joined with the conjunction "and" and therefore, stated a single offense. The verdict of the jury was they found the defendants guilty in manner and form as charged in the information. There was evidence which if believed by the jury supported the finding that the defendants had committed each of the several acts stated in the count. The general verdict of the jury would be construed as being a verdict of guilty of the offense charged in the count and that in the commission of the offense charged the defendants had committed each of the acts therein alleged. There was no error in the court's ruling upon this objection.

The final assignment of error which is argued is that the judgment is insufficient in form, improper, vague and uncertain. The form of the judgment is, "On this 18th day of February, A. D. 1935, this cause coming on to be heard, motion in arrest of judgment overruled. Defendants Oliver J. Schmidt and Mrs. Oliver J. Schmidt personally in court attended and represented by counsel. Judgment on verdict of jury as follows: Ordered that the defendant Oliver J. Schmidt pay a fine of Two Hundred and Fifty Dollars and that the defendant Mrs. Oliver J. Schmidt pay a fine of Two Hundred and Fifty Dollars, and that each of said defendants pay one-half of the costs of this proceedings". This was an adjudication by the court finding the defendants guilty on the verdict which had been returned and the order of the court fixing the penalty that the defendants each pay a fine of Two Hundred and Fifty Dollars and one-half the costs. This was sufficient in form and substance. *People v. Murphy*, 188 Ill. 144.

Other errors have been assigned but have not been argued, therefore they are deemed to have been waived. *The People v. Rooney*, 355 Ill. 613; *The People v. Smith*, 275 Ill. App. 199; *The People v. Throop*, 277 Ill. App. 1.

The judgment of the County Court of Bond County is affirmed.

Not to be published in full Judgment affirmed.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM A. D. 1935.

TERM NO. 6.

AGENDA NO. 11.

ALBERT RUBACH,
Appellant,
vs.

THE PEOPLE, etc., at the
Relation of EDITH CASTENS,
Appellee,

)
) Writ of error to the
)
) County Court of
)
) Randolph County, Illinois.
)

281 I.A. 617³

STONE, J:

This is a prosecution in bastardy. The jury returned a verdict finding the defendant guilty. No issue was made up before proceeding to trial, nor was an issue entered upon the record. Defendant's motions for new trial and in arrest of judgment, both based upon said failure to make up an issue, were overruled, and defendant excepted and sued out a writ of error to the Appellate Court. The point urged for reversal in this court is that the County Court failed to have an issue made up before proceeding to a trial of the cause. The record fails to show that a plea of any kind was entered, and, in fact, no plea was entered, nor was the defendant called upon to plead.

We had this identical question before us at the February term. PAHLMAN v. THE PEOPLE. Term No. 16, Agenda No. 16. In that case we said: "No objection was made before commencing the trial, the same as here, when, if such objection had been made, the required issue could have been formed, as it manifestly would have been had appellant seen fit to urge same in time. He, however, chose to waive the irregularity and consented to trial, where the jury answered, in the affirmative, the only issue which could have been submitted to them under the statute.

Within the rule, and for the reasons, stated in the authorities cited, we are of opinion that he is now in no position to complain of the court's failure to make up the formal statutory issue."

We have been shown no reason for disturbing our holding in that case. The judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

not to be published in full.

11

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT.

72

THE PEOPLE OF THE STATE OF
ILLINOIS on the relation of
and in the name of Oscar Nelson,
Auditor of Public Accounts of
the State of Illinois,

vs.

CITIZENS STATE BANK OF CREAL
SPRINGS, ILLINOIS

M. D. BORUM, Intervening
Petitioner

Appellee

vs.

WILLIAM L. O'CONNELL, As
Receiver of Citizens State Bank
of Creal Springs, Illinois,
Respondent,

Appellant

Sum No 8

STONE, J.

This is an appeal from an order of the Circuit Court of
Williamson County declaring a certain deposit made by M. D. Borum,
appellee, in the Citizens State Bank of Creal Springs, Illinois, to be
a preferred claim on the assets in the hands of appellant, William L.
O'Connell, Receiver of the said bank.

Appellee filed an intervening petition in the suit to
dissolve the Citizens State Bank and to distribute the assets.
The Circuit Court of Williamson County held that the intervening
petitioner had a valid trust claim which was entitled to a preference
in distribution of assets in the hands of the receiver. An appeal
was taken from the order to this court. This court held in People ex rel
Nelson v. Citizens State Bank, 274 Ill. App. 468 that the Circuit
Court erred in refusing to admit proper evidence and the cause was
reversed and remanded. On the second trial the Circuit Court
entered substantially the same order as the one made after the
previous hearing, and we are asked to review that decision.

Appeal from the
Circuit Court of
Williamson County,
Illinois

Honorable Geo. B. White,
Judge Presiding.

281 I.A. 617⁴

Agenda No 13

IN THE
APPellate COURT OF ILLINOIS
FOURTH DISTRICT.

THE PEOPLE OF THE STATE OF
ILLINOIS on the relation of
and in the name of Oscar Nelson,
Auditor of Public Accounts of
the State of Illinois,

vs.
CITIZENS STATE BANK OF GREAT
SPRING, ILLINOIS

M. D. BORUM, Intervening
Petitioner
Appellee

vs.
WILLIAM L. O'CONNELL, as
Receiver of Citizens State Bank
of Great Springs, Illinois,
Respondent,

Appellant

Summa

STONE, J.

This is an appeal from an order of the Circuit Court of
Williamson County declaring a certain deposit made by M. D. Borum,
appellee, in the Citizens State Bank of Great Springs, Illinois, to be
a preferred claim on the assets in the hands of appellant, William L.
O'Connell, Receiver of the said bank.

Appellee filed an intervening petition in the suit to

dissolve the Citizens State Bank and to distribute the assets.

The Circuit Court of Williamson County held that the intervening

petitioner had a valid trust claim which was entitled to a preference

in distribution of assets in the hands of the receiver. An appeal

was taken from the order to this court. This court held in People ex rel

Nelson v. Citizens State Bank, 274 Ill. App. 468 that the Circuit

Court erred in refusing to admit proper evidence and the same was

reversed and remanded. On the second trial the Circuit Court

entered substantially the same order as the one made after the

previous hearing, and we are asked to review that decision.

Appeal from the
Circuit Court of
Williamson County,
Illinois

Honorable Geo. B. Stone,
Judge Presiding.

281 I.A. 617

Agenda No. 15

The evidence showed that M. D. Borum, appellee, had \$5000.00 on deposit in the Marion Trust and Savings Bank, and that on the solicitation of the president of the Citizens State Bank of Greal Springs, appellee withdrew part of his account with the Marion Bank and, on March 22, 1930, deposited \$2,600.00 in the Citizens State Bank. Appellee received for this deposit the following receipt:

"Greal Springs, Ill., March 22, 1930.

Received of M. D. Borum \$2,600.00, Twenty-six Hundred Dollars to purchase 4th Liberty Loan Bonds.

Citizens State Bank
Greal Springs, Ill.

R. M. Taylor, Cashier."

On March 28, 1931, this receipt was returned to the bank and a receipt identical in form was given for \$2,500.00. Appellee had other accounts with the Citizens State Bank. On March 28, 1931 he drew interest on his accounts including the above account for \$2,600.00.

The position of the appellant is that the deposit for the purchase of bonds was a subterfuge for the purpose of avoiding the payment of taxes. W. H. Kimmel, president of the Citizens State Bank, testified that when he solicited appellee for his account appellee expressed willingness to transfer the account if he could carry it there in the same way that he was permitted to carry it in the Marion Bank, that is, a deposit under a receipt for purchase of bonds, which could be shown to the assessor for the purpose of avoiding taxes. The president and other officers of the bank testified that no request for the delivery of bonds was ever made.

Appellee denied the conversation with the bank president, and testified further that he had inquired on March 28, 1931, why the bank could not deliver the bonds. He testified that the cashier informed him that the bank had been unable to purchase the bonds because it had been required to put up a large amount of securities as collateral for a \$10,000.00 loan from a St. Louis bank. The cashier denied that a request for bonds had been made.

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E. W. Taylor, Cashier."

Citizens State Bank
Great Springs, Ill.

Polina to purchase 4th Liberty Loan Bonds.

Received of M. I. Borum \$2,800.00, Twenty-six Hundred

"Great Springs, Ill., March 28, 1930.

receipt:

State Bank. Appellee received for this deposit the following

Bank and, on March 28, 1930, deposited \$2,800.00 in the Citizens

Great Springs, appellee withdrew part of his account with the Marion

on the solicitation of the president of the Citizens State Bank of

\$5000.00 on deposit in the Marion Trust and Savings Bank, and that

The evidence showed that M. I. Borum, appellee, had

The account for purchase of bonds carried at the Marion Bank was limited by the condition that the bonds be purchased at par. This is given as the explanation for the fact that no bonds were purchased by the Marion Bank.

The Citizens State Bank was closed on January 4, 1932, no bonds having been purchased for appellee.

During all this time the moneys were mingled with the assets of the bank, and the account was carried in the records of the bank as a time deposit account. However, the certificates of deposit were not shown to appellee and his receipt was in the form set forth above.

While it is true as appellant contends that the length of time the money was left for the purchase of bonds, the fact that interest was paid on the account, and the fact that a similar account was carried in another bank all tend to impugn the good faith of appellee, yet the question of appellee's intent is purely a question of fact. The evidence is sharply conflicting. There is some evidence that appellee was concerned over the length of time the bank kept the money without purchasing the bonds. The Chancellor heard the witnesses and had an opportunity to observe them. This afforded the Chancellor a superior opportunity for judging the weight to be given to the testimony. Hollenbeck v. Cook, 180 Ill. 65; Carney v. Sheedy, 295 Ill. 83; People v. Lipiano, 358 Ill. 475; Flaberg v. Flaberg, 358 Ill. 626. In order to justify a reversal of the decision on this ground it would be necessary for this court to find that the decision is clearly contrary to the manifest weight of the evidence. We cannot do this where the evidence is so sharply conflicting as to those conversations which relate to appellee's intent to purchase bonds.

The other question which requires our attention concerns the continued existence of the trust funds. On the previous appeal this court suggested the necessity of proof of the amount of the general funds of the bank with which appellee's moneys were mingled, between the time of the deposit and the bank's closing.

The evidence on this subject consisted of the testimony of Joe P. Benson, deputy receiver of the bank. He testified that he

The account for purchase of bonds carried at the Marion Bank was limited by the condition that the bonds be purchased at par. This is given as the explanation for the fact that no bonds were purchased by the Marion Bank.

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had made an examination of the records of the Citizens State Bank of Greal Springs with reference to how much cash was on hand on March 22, 1930 and from then to December 31, 1931. He stated that on the first date the cash balance shown was \$8,614.77 and on the last date \$11,111.07, and that the records showed no cash balance less than \$2,500.00 at any time or on any day between those dates. He stated that he did not know if the figures in the books he examined were correct, that he did not know whether the bank had the cash shown on these books at the times indicated, that the books were not prepared for him or at his direction, that he did not know who prepared the books, that he did not know that the person that prepared them was connected with the bank.

It appears that two cashiers of the bank and the president of the bank were at the trial. There is no evidence that the books were the books of the bank, or that the person who prepared the books of the bank was unavailable.

In the case of LeRoy State Bank v. Keenan's Bank, 337 Ill. 173 on 191, the Supreme Court of Illinois stated the principles applicable to cases of this kind:

"While the material contents of an existing book of original entry which is obtainable cannot be proved by parol testimony, because the book is the best evidence, yet where the originals consist of numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection, any competent witness who has examined the originals may testify as to such result, provided it is capable of being ascertained by calculation. (Interstate Finance Corp. v. Commercial Jewelry Co. 280 Ill. 116; People v. Gerold 265 id. 448.) It is in the discretion of the court to admit such statements or schedules of figures or the results of the examination of numerous documents or account books to be introduced in evidence, such statements, schedules or results to be verified by the testimony of the witness by whom they were prepared, allowing the adverse party an opportunity to examine them before they are admitted in evidence and to examine the witness from the original books, where such books are accessible. (People v. Sawhill, 299 Ill. 393.) While the results of the examination of voluminous documents, writings, records and books may be proved by expert accountants or other competent person who has made the examination, the documents, records or books upon which the examination is based must be of such a character as to be themselves admissible in evidence. The oral evidence is admissible because the voluminous character of the instruments of evidence precludes their examination in court, and the testimony to results reached

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by their examination is merely a statement of what those instruments show. It was therefore necessary that the books and papers which the expert accountants examined should themselves have been competent evidence. In order to render an account book admissible in evidence it is essential that proof as satisfactory as the transactions are under the circumstances reasonably susceptible of, shall be given that the entries made are correctly recorded. (People v. Small, 319 Ill. 437; Chisholm v. Beaman Machine Co. 160 id. 101; House v. Beak, 141 id. 290.) Where the testimony of a witness who made the entries is not available it is competent to establish the authenticity of the book by other evidence. The only evidence produced of the authenticity of the books which the accountants examined is the testimony of the cashier of the LeRoy Bank. He did not become cashier until three months after the making of the contract and the transfer of the assets to that bank. He did not make all the entries in the books. He did not testify and could not testify, to the correctness of all those entries. Entries were made by the assistant cashier and other persons whose names were mentioned in the cashier's testimony, but they were not called to show that the entries were correctly made, and there was no testimony that they were not available. * * * * * Since the books were not shown to be competent evidence the statement of the conclusions reached by a consideration of them was not competent evidence and should not have been admitted."

It follows from the principles set forth in the LeRoy State Bank case that the Circuit Court should have allowed the motion to strike the testimony of the witness Benson on the ground that the books on which his testimony was based were not shown to be the books of the bank.

The evidence in the matter of tracing the trust funds is insufficient in another respect. The auditor of Public Accounts did not take possession of the bank until January 4, 1932, the day the bank closed. No attempt has been made by petitioner to show that the fund was not dissipated by withdrawals or otherwise between December 31, 1931, the date of the last cash balance given, and January 4, 1932, the day the bank closed.

While the question does not appear to have been raised it seems also true that a showing that there was no less than \$2,500.00 in cash in the bank on any of the effective dates would not be sufficient to enable the Circuit Court to make a final order for payment of a \$2,500.00 trust claim if it appeared that there were other trusts which were entitled to preference out of that cash balance.

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It follows from the principles set forth in the LeRoy State Bank case that the Circuit Court should have allowed the motion to strike the testimony of the witness Brennan on the ground that the books on which his testimony was based were not shown to be the books of the bank.

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For the error in admitting the testimony of the witness as to the result of his examination of the books of the bank, for the lack of any evidence to establish the existence of the trust res between December 31, 1931 and the closing of the bank the decree of the Circuit Court of Williamson County is reversed and the cause remanded to the Circuit Court.

REVERSED AND REMANDED.

not to be published in full

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For the error in stating the testimony of the witness

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM A. D. 1935.

73

TERM NO. 9.

AGENDA NO. 14.

THE PEOPLE OF THE STATE
OF ILLINOIS,
Plaintiff in error,
vs.
ESTELLE H. GOODEN and
NADINE GOODEN,
Defendants in error.)

Writ of error to the
Circuit Court of
Williamson County.

281 I.A. 617

STONE, J:

This writ of error is prosecuted by the People for the purpose of obtaining a review of the judgment of the Circuit Court in quashing certain counts of an indictment for conspiracy against defendants in error. It is brought by the State's Attorney under authority of the Act of 1933. Chap. 38 Sec. 747 Smith-Hurd's Rev. Stat.

The indictment consists of four counts each charging a conspiracy to commit an unlawful act. The first count is not under examination. It was nolleed by the State's Attorney on leave of court after the court had sustained a motion to quash counts 2, 3, and 4. Section 46 of our Criminal Code is as follows:

"If any two or more persons conspire or agree together, or the officers or executive committee of any association or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organization, or corporations, for the purpose of establishing a so-called boycott or black list, or shall post, or distribute any written or printed notice in any place, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment, or property of another, or to obtain money or

other property by false pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice, or to prevent competition in the letting of any contract by the State or the authorities of any county, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding \$2,000, or both.

If any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-called boycott or black list, or shall post or distribute any written or printed notice in any place, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or employment, by false pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice or to prevent competition in the letting of any contract by the State, or the authorities of any counties, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be fined not exceeding \$2,000, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the County jail or penitentiary."

The motion to quash was an oral one so we do not know what grounds were urged upon the court for quashing these counts. The judgment of the court is a mere formal judgment quashing the counts and gives no reason for the action of the court. Defendants in error have filed no brief and so have not only rendered this court no assistance in arriving at a correct conclusion of the matter, but have given us no hint of their position or what it was which influenced the trial court in its judgment.

Count 2 charges that defendants in error feloniously, fraudulently and deceitfully did conspire and agree together with the fraudulent and malicious intent then and there feloniously, wrongfully, wickedly and falsely pretend and counterfit a burglary of a certain safe in the office of the County Clerk in the Court House of Williamson County, and then and there feloniously, wrongfully and wickedly obtain a large sum of money therefrom, to wit, the sum of \$500.00 of the property of the County of Williamson and the sum of \$1,970.19, the property of the City of Marion and by such false pretenses then and there did cheat and defraud the said municipal corporations.

Count 4 charges that defendants in error feloniously, fraudulently and deceitfully did conspire and agree together with fraudulent and malicious intent and agree together to do an illegal act injurious to the administration of public justice and injurious to the public police, public morals, good order and welfare; that is to say, then and there feloniously, unlawfully, wilfully and knowingly did conspire to commit an offense against the People of the State of Illinois, that is to say, the offense of feloniously, unlawfully and wilfully and knowingly embezzling a large sum of money, the property of the county and city and so forth.

In PEOPLE v. WARFIELD 261 Ill. 300, our Supreme Court said:

"So where a statute in making it a crime to conspire to commit a certain misdemeanor, designates the misdemeanor by its common or popular name, without detaching

all the elements necessary to constitute the misdemeanor, an indictment charging such conspiracy need not allege all the elements necessary to constitute the misdemeanor contemplated by the statute."

It was further held in the same case that the crime is complete when the conspiracy is formed for the purpose of committing it. In *PEOPLE v. CUPPAN* 286 Ill. 302, it was held that to constitute the offense at common law it was not necessary that the object of the conspiracy should constitute a criminal act but it was sufficient if the object was unlawful though not indictable. And that if an offense both against the common law and the statute the People may proceed under either the statute or the common law or both.

In *PEOPLE v. BLUMENBERG* 271 Ill. 180, it was held that the unlawful combination alone constitutes the offense of conspiracy and no act in furtherance of the unlawful design is necessary to complete the offense.

In the case at bar the counts which were quashed charge in apt words the formation of a conspiracy to commit the offense of obtaining money by means of false pretenses. Some of the counts go into detail in describing the means by which the conspiracy was to operate. We are of the opinion that the trial court erred in quashing the counts in question.

The judgment of the trial court is reversed and the cause remanded with instruction to overrule the motion to quash.

REVERSED AND REMANDED
WITH DIRECTIONS.

Not to be published in full.

